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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 19, ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS AND FOR RULE TO SHOW CAUSE, AND PETITION FOR MANDAMUS

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

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Texas, Houston Division, that certain suit now pending in the District Court of Harris County, Sixty-First Judicial District of Texas, No. C-211,736 on the docket of said State Court, entitled "Tyrrell & Garth Investment Company v. Houston North Shore Railway Company, et al."; and (b) further directing the Clerk of said District Court of the United States to issue a writ of certiorari to said State Court, commanding it to send to said District Court of the United States the record and the proceedings in said suit, and to take and entertain jurisdiction of said suit.

Your petitioners further move that a rule be entered and issued, directing the Honorable Thomas M. Kennerly, United States District Judge for the Southern District of Texas, and the District Court of the United States for the Southern District of Texas, Houston Division, to show cause why a writ of mandamus should not issue against them in accordance with the prayer of said petition, and why the petitioners should not have such other and further relief in the premises as may be just and meet.

Dated December 4, 1933.

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. ....., ORIGINAL

PETITION OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., FOR WRIT OF MANDAMUS

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, L. W. Baldwin and Guy A. Thompson, Trustees, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, respectfully show:

I.

1. Your petitioners L. W. Baldwin and Guy A. Thompson are citizens and residents of the City and County of St. Louis, State of Missouri. Your petitioners, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, are corporations, duly created, incorporated and existing under the laws of the State of Texas, and are citizens

of said State, and each has its principal office in the City of Houston, Harris County, Texas.

2. On the 31st day of March, 1933, Missouri Pacific Railroad Company, a Missouri corporation, filed in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, in which it then had and for more than six months had maintained its principal operating office, a petition for reorganization under Section 77 of the Federal Act relating to Bankruptcy, the filing of which petition was duly approved by the Judge of said Court. Thereafter, on the 2nd day of May, 1933, Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company (with certain other railroad companies), each being a corporation a majority of whose capital stock, having power to vote for the election of directors, was then owned indirectly, through an intervening medium, by said Missouri Pacific Railroad Company, filed in the same proceeding their petition for reorganization under said Section 77, the filing of which petition was duly approved on the same date by the Judge of said Court.

3. Upon the filing of said petition by Missouri Pacific Railroad Company, Debtor, the Honorable C. B. Faris, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, duly entered an order of said Court by the terms of which the said debtor was authorized and directed, pending the further orders of said Court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of said debtor, wherever situated, whether in the State of Missouri, in the Judicial District of said Court, or elsewhere, and to manage and conduct its business as a railroad

company. Said order conferred such further incidental powers as were necessary to carry forward the business of a common carrier by rail, such authority being made specifically subject to the supervision and control of said Court, and to such further orders as the Court might enter in said proceeding. By said order the debtor was given specific instructions as to payment of taxes due or to become due, payment of necessary expenses of operation, payment of certain classes of claims, and preparation of certain statements of account. The order closed with a provision that the Court reserved full right and jurisdiction to make, from time to time, such other orders as it might deem proper.

4. On May 2, 1933, the said Court, upon the filing of the said petition of The Beaumont, Sour Lake & Western Railway Company, Houston North Shore Railway Company and other railroad companies, entered its order providing that the said order theretofore entered by the Court in said proceedings on March 31, 1933, with reference to the operation of the railroad and other property of Missouri Pacific Railroad Company, the payment of taxes, expenses, certain claims and other items, and the exercise of other powers and privileges as therein set forth, should be extended and made applicable to The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and all other debtor companies joining in the last mentioned petition. Said order of May 2, 1933, closed with a reservation by the Court of full right and jurisdiction to make, from time to time, such further orders as the Court might deem proper with reference to the operation of the properties of The Beaumont, Sour Lake & Western Railway Company, Debtor, and Houston North Shore Railway Company, Debtor, and with reference to any proposed

plan of reorganization, and reserving in general the right to make other orders, amplifying, extending, limiting or otherwise modifying said order of May 2, 1933.

5. Thereafter, by an order duly made and entered on the 22nd day of June, 1933, by the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, your petitioners L. W. Baldwin and Guy A. Thompson were duly appointed temporary trustees of all and singular the railroads, lands, properties, estates, rights and franchises of whatever character and wherever situated of The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company and each of them. Said appointment, by the terms of said order became effective as of the beginning of business on July 1, 1933, provided for the execution and filing of bonds by petitioners L. W. Baldwin and Guy A. Thompson, as such trustees, and for a further hearing to be held on the 25th day of July to determine whether such appointment should be made permanent or should be terminated. The bonds so required by said order were duly made and filed with the Clerk of said Court, and your petitioners L. W. Baldwin and Guy A. Thompson took the required oath of office as such trustees. By the further order of said Court, duly made and entered on the 25th day of July, 1933, after the hearing provided for, the appointment of your said petitioners, as such trustees, was confirmed and approved and made permanent and your said petitioners were thereby appointed permanent trustees of all and singular the railroads, land, properties, estates, rights and franchises of whatever character and wherever situated of the said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them, and by said order

it was expressly provided that your petitioners, as such trustees, should have all the rights, and, subject to the control of the Court and consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, should exericse all of the powers of trustees appointed pursuant to Section 44 or any other section of the said Act of Congress relating to bankruptcy. By the terms of said order your petitioners, as such trustees, were authorized and directed to run, manage, maintain and operate the railroads and properties of the said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them, wherever situated, and to manage and conduct the business of said railroad companies, respectively, and to exercise such sundry other powers according to law and subject to the supervision and control of said Court as the Court might direct by other orders entered in said cause.

6. By reason of the premises your petitioners allege that prior to the institution of the suit below described, to-wit: from the 2nd day of May, 1933, until and including the 30th day of June, 1933, petitioners, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, became, and during the said period continued to be, in effect, agents and officers of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri; that by virtue of the above described petitions and orders said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company lost their right and power to operate their railroad properties independently and that during said fifty-nine-day period they possessed the power to operate their respective properties only in such manner

as was or might be directed and permitted by the said United States District Court, subject to its orders, supervision, control and direction, and not in such manner as might otherwise have been prescribed by the officers and directors of said respective railroad companies. That on and after the 1st day of July, 1933, and prior to the institution of the suit hereinbelow described, your petitioners L. W. Baldwin and Guy A. Thompson became, and have ever since been and now are, the duly appointed, qualified and acting trustees of the said The Beaumont, Sour Lake & Western Railway Company, Debtor, and of Houston North Shore Railway Company, Debtor, and of their and each of their railroads, lands, properties, estates, rights and franchises, and are now and since the 1st day of July, 1933, have been officers of the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri; and as such trustees and such officers of Court they were, prior to the institution of the suit hereinbelow described, in possession and entitled to the possession of the lands, premises and properties described in plaintiff's petition in said suit.

II.

1. On the 7th day of August, 1933, Tyrrell & Garth Investment Company, a joint stock association, as plaintiff, filed its petition in the District Court of Harris County, Sixty-First Judicial District of Texas, in a suit numbered C-211,736 on the docket of said Court, wherein petitioners Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company and one Harry K. Johnson were named as defendants. Thereafter, on October 2, 1933, said Tyrrell & Garth Investment Company filed in said Court, in

lieu of said original petition, its first amended original petition, wherein the same parties are named as plaintiff and defendants, except that petitioners L. W. Baldwin and Guy A. Thompson, in their capacity as trustees as hereinbefore alleged, were also named as additional defendants. In its said amended petition, said Tyrell & Garth Investment Company seeks, as against petitioners, to cancel and to have annulled, as clouds upon the plaintiff's alleged title to said lands, certain deeds, therein described, conveying an easement and right of way over certain lands in said amended petition described, due to the alleged failure of petitioners, as such officers of Court, to observe and comply with certain conditions alleged to be contained in said deeds, with respect to the operation of petitioners' trains. Plaintiff further prays, in the said amended petition, for an injunction permanently enjoining and restraining these petitioners, and each of them (including the trustee petitioners in their official capacity), from making further use of said lands for right of way purposes or for any other purpose whatsoever, and especially from using the same for the operation of trains, cars or coaches thereon, and as a railroad or interurban right of way. Plaintiff further seeks therein to recover from petitioners the sum of One Hundred Fifty Thousand Dollars ($150,000.00) as damages allegedly sustained as a result of the acts and omissions of petitioners, through depreciation of the value of its lands in the vicinity of the said right of way, and the sum of Ten Thousand Dollars ($10,000.00) from petitioners Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company, and from defendant Johnson, as an alleged equitable diminution in the value of certain other lands in said petition described. Reference is here made to

said amended petition for a further statement of the allegations and prayers thereof and of the nature and objects of said suit.

2. There has not been as yet any trial or final hearing of said suit.

III.

1. Being desirous of having said suit removed for trial into the District Court of the United States for the Southern District of Texas, Houston Division, that being the judicial district and division in which said suit was and is so pending in said State Court, your petitioners, on the 19th day of October, 1933, conformably to the provisions of Section 76 of Title 28, United States Code, presented to the District Court of the United States for the Southern District of Texas, at Houston, which was then in session, their petition for removal and certiorari, a copy of which, marked "Exhibit 1" is hereto attached and is hereby referred to and made a part hereof as fully as though here set forth at length.

2. And at the same time your petitioners presented to the said Court an amendment of and supplement to the said petition for removal and certiorari, a copy of which, marked "Exhibit 2," is hereto attached and is hereby referred to and made a part hereof as fully as though here set forth at length.

3. And at the same time the said Tyrrell & Garth Investment Company, plaintiff in said suit, by its attorneys, submitted to said Court its reply to said petition for removal and certiorari, a copy of which, marked "Exhibit 3," is hereto attached and is hereby referred to and made a part hereof as fully as though here set forth at length.

4. A true copy of plaintiff's first amended original petition filed in said suit in said State Court will be found attached to said last mentioned reply and is hereby referred to in aid of the allegations of paragraph 1 of Section II hereof, with respect to the nature of and parties to the said suit and the relief sought therein by the plaintiff. There is also attached to said reply a copy of an order of partial dismissal, entered on motion of the plaintiff by said State Court in said suit, after counsel for plaintiff were advised that your petitioners intended to present their said petition for removal and certiorari to said United States District Court. The effect of said order of partial dismissal (to said copy whereof reference is here made) was to dismiss and withdraw the plaintiff's prayer for an injunction as against the trustee petitioners, leaving intact the entire remainder of said amended petition, and expressly reserving to said plaintiff the right hereafter to seek such injunction against the corporate petitioners when and if they shall be discharged from the jurisdiction and control of said United States District Court for the Eastern District of Missouri.

5. At the time of presenting to said District Court the pleadings and matters referred to above, to-wit: on October 19, 1933, said petition, supplemental and amended petition and reply, with all exhibits attached thereto, were delivered to and filed with the Clerk of said District Court, for the consideration and use and at the suggestion of the Judge, the Honorable T. M. Kennerly; but the said Clerk did not then place, and has not since placed, his file mark thereon.

6. That said suit has not yet been removed to, or entered on the docket of, the said District Court of the

United States for the Southern District of Texas; and no motion to remand the same to the said State Court has ever been filed in or acted upon by said District Court of the United States.

7. The Honorable Thomas M. Kennerly, Judge of the District Court of the United States for the Southern District of Texas, having heard the arguments of counsel and having considered briefs by them respectively filed, and having taken under advisement the matter so submitted to him as the Judge of said Court, on the said 19th day of October, 1933, did, on the 20th day of November, 1933, endorse upon said amendment of and supplement to said petition for removal and certiorari a certain order and direction in words and figures as follows, to-wit:

"Beaumont, Texas, November 20, 1933

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

"Tyrell & Garth Investment Company,
versus
Houston North Shore Railway Company, et al.

"The foregoing Petition for Removal and Certiorari and Exhibits attached and referred to, shows that the suit sought to be removed to this Court is not a suit in which Plaintiff seeks to hold L. W. Baldwin and Guy A. Thompson, Trustees, responsible in their own person and/or property, but only in their representative capacity. It is, therefore,

denied. See Ruff v. Gay, C. C. A. (5th), No. 7008, decided November 15, 1933.

(signed) T. M. Kennerly,
United States District Judge."

And the said Judge thereupon returned to counsel for petitioners, and such counsel now hold, the said petition, supplemental and amended petition and reply.

8. That thereby said United States District Court and the Judge thereof refused to take or entertain jurisdiction of said suit; and refused to order that said suit, conformably to the provisions and requirements of Section 76 of Title 28, United States Code, be removed for trial from said State Court into the said District Court of the United States for the Southern District of Texas; and refused to cause said petitions and reply to be endorsed as filed and to be retained by the Clerk of said Court; and refused to issue and cause to be issued, conformably to said statute, a writ of certiorari to said State Court requiring it to send to said District Court of the United States the record and the proceedings in said suit, notwithstanding the fact that your petitioners, and each of them, are plainly entitled to such an order and to such writ and to such action, by virtue of said statute.

WHEREFORE, your petitioners, being without remedy other than sought herein, pray that a writ of mandamus may issue out of this Honorable Court directed to the said United States District Court for the Southern District of Texas and to the Honorable Thomas M. Kennerly, the Judge of said Court, commanding them and each of them to take and entertain jurisdiction of said suit; to enter an order pursuant to Section 76 of Title 28, United States Code, directing that there be removed

into, for trial in, the said District Court of the United States for the Southern District of Texas, Houston Division, that certain suit now pending in the District Court of Harris County, Sixty-First Judicial District of Texas, No. C-211,736 on the docket of said State Court, entitled "Tyrrell & Garth Investment Company v. Houston North Shore Railway Company, et al.," and further directing the Clerk of said District Court of the United States to receive, file and hold said petitions and reply and to issue a writ of certiorari to said State Court commanding it to send to said District Court of the United States the record and the proceedings in said suit; and to do and perform all such other acts and things as may be necessary and appropriate in the premises.
Dated December 4, 1933.

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

UNITED STATES OF AMERICA
THE STATE OF TEXAS
COUNTY OF HARRIS

ROBERT H. KELLEY, being first duly sworn, deposes and says that he is one of the attorneys for the petitioners named in the foregoing petition; that he has read the said petition and believes the same to be true; that said petitioning trustees are absent from and are non-residents of the County of Harris and State of Texas, and affiant makes this affidavit for the reason that said petitioners are absent from and are non-residents of said County of Harris in which said suit is brought, and as General Attorney of the corporate petitioners named

above, and for the further reason that as attorney for the defendants in said suit, he is familiar with the facts relating thereto.

ROBERT H. KELLEY,

SWORN TO AND SUBSCRIBED before me by Robert H. Kelley this 1st day of December, A. D. 1933.

(Notarial Seal)

VIRGINIA RATLIFF,
Notary Public in and for
Harris County, Texas.

Exhibit 1

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTICT OF TEXAS, HOUSTON DIVISION

Tyrrell & Garth Investment Company, Plaintiff versus Houston North Shore Railway Company, et al., Defendants	In Equity No.....

PETITION FOR REMOVAL AND CERTIORARI

To the Honorable District Court of the United States for the Southern District of Texas, Holding Sessions at Houston:

Come now L. W. Baldwin, Guy A. Thompson, Houston North Shore Railway Company, and The Beaumont, Sour Lake & Western Railway Company, herein called petitioners, and respectfully represent:

I.

On the 7th day of August, A. D. 1933, Tyrrell & Garth Investment Company, a joint stock association, filed a petition in the District Court of Harris County, Texas, 61st Judicial District, in a suit numbered C-211,736 on the docket of said court, wherein Tyrrell & Garth Investment Company was named as plaintiff, and Houston North Shore Railway Company, a corporation, and The Beaumont, Sour Lake & Western Railway Company, a corporation, and Harry K. John-

son were named as defendants. Thereafter, on October 2, 1933, said Tyrrell & Garth Investment Company filed in said court its first amended original petition, wherein the same parties are named as plaintiff and defendants, except that your petitioners, L. W. Baldwin and Guy A. Thompson, Trustees as hereinafter alleged, were also named as additional defendants. In its said amended petition Tyrrell & Garth Investment Company, plaintiff, seeks, as against petitioners, to cancel and annul certain deeds therein specified conveying an easement and right-of-way over certain lands in said petition described, due to the alleged failure of petitioners to observe and comply with certain alleged conditions in said deeds contained, with respect to the operation of their trains. Plaintiff further prays in the said amended petition for an injunction, permanently enjoining and restraining these petitioners and each of them, (including the Trustee petitioners in their official capacity), from making further use of said lands for right-of-way purposes or for any other purpose whatsoever, and especially from using the same for the operation of trains, cars, or coaches thereon, and as a railroad or interurban right-of-way. Plaintiff further seeks therein to recover from petitioners the sum of One Hundred Fifty Thousand ($150,000.00) Dollars as damages allegedly sustained as a result of the acts and omissions of petitioners, through depreciation of the value of its lands in the vicinity of the said right-of-way, and the sum of Ten Thousand ($10,000.00) Dollars from petitioners Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company, and from defendant Johnson as an alleged equitable diminution from the value of certain other lands in said petition

described. Reference is here made to said amended petition for a further statement of the allegations and prayers thereof and of the nature and objects of said suit.

II.

There has not been as yet any trial or final hearing of said suit.

III.

On the 31st day of March, 1933, Missouri Pacific Railroad Company, a Missouri corporation, filed in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, a petition for reorganization under Section 77 of the Federal Act relating to Bankruptcy, the filing of which was duly approved by the Judge of said Court. Thereafter, on the 2nd day of May, 1933, Houston North Shore Railway Company and The Beaumont, Sour Lake & Western Railway Company (with certain other railroad companies) each a corporation a majority of whose capital stock, having power to vote for the election of directors, was then owned, indirectly through an intervening medium, by Missouri Pacific Railroad Company, filed in the same proceeding their petition for reorganization, which, on the same date, was duly approved by the Judge of said court.

IV.

Upon the filing of the first named petition by Missouri Pacific Railroad Company, Debtor, the Hon. C. B. Faris, Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of

Missouri, duly entered an order by the terms of which the debtor (Missouri Pacific Railroad Company) was authorized and directed, pending further order of said Court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of said debtor, wherever situated, whether in the State of Missouri in the Judicial District of said Court or elsewhere, and to manage and conduct its business as a railroad company; and said order conferred such further incidental powers as were necessary to carry forward the business of a common carrier by rail, such authority being made specifically subject to the supervision and control of said Court, and to such further orders as the court might enter in said proceeding. By the terms of said order the debtor was given specific instructions as to payment of taxes due or to become due, the payment of necessary expenses of operation, the payment of certain classes of claims, and the preparation of certain statements of account. The order closed with a stipulation that the Court reserved full right and jurisdiction to make, from time to time, such other orders as the Court might deem proper.

V.

On May 2nd, 1933, the said Court, upon the filing of the petition of The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and other railroad companies, entered its order providing that the order theretofore entered by the Court in said proceedings on March 31st, 1933, with reference to the operation of the railroad and other property of Missouri Pacific Railroad Company, the payment of taxes, expenses, certain claims and other items,

and the exercise of other powers and privileges as therein set forth, should be extended to and made applicable to The Beaumont, Sour Lake & Western Railway Company, and Houston North Shore Railway Company, and all other debtor companies, joining in the petition filed on said date. Said last named order closed with a reservation by the Court of full right and jurisdiction to make, from time to time, such further orders as the Court might deem proper with reference to the operation of the properties of The Beaumont, Sour Lake & Western Railway Company, Debtor, and Houston North Shore Railway Company, Debtor, and with reference to any proposed plan of reorganization, and reserving in general the right to make other orders, amplifying, extending, limiting, or otherwise modifying said order of May 2nd, 1933.

VI.

Thereafter, by an order duly made and entered on the 22nd day of June, 1933, by the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, your petitioners, L. W. Baldwin and Guy A. Thompson, were duly appointed temporary trustees of all and singular the railroads, lands, properties, estates, rights and franchises of whatever character and wherever situated of The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company. Said appointment, by the terms of said order, became effective as of the beginning of business on July 1st, 1933, provided for the execution and filing of bonds by your petitioners, L. W. Baldwin and Guy A. Thompson as such trustees, and for a further hearing to be held on the 25th day of July

to determine whether such appointment should be made permanent or should be terminated. The bonds so required by said order were duly made and filed with the Clerk of said Court, and your petitioners L. W. Baldwin and Guy A. Thompson, took the required oath of office as such trustees. By the further order of said Court, duly made and entered on the 25th day of July, 1933, after the hearing so provided for, the appointment of your petitioners, as such trustees, was confiirmed and approved and made permanent and your petitioners were appointed permanent trustees of all and singular the railroads, lands, properties, estates, rights, and franchises of whatever character and wherever situated of the said The Beaumont, Sour Lake & Western Railway Company, and Houston North Shore Railway Company, and by said order it was expressly provided that your petitioners, as such trustees, should have all rights and, subject to the control of the Court and consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, should exercise all of the powers of Trustees appointed pursuant to Section 44 or any other section of the Act of Congress relating to bankruptcy. By the terms of said order your petitioners, as such Trustees, were authorized and directed to run, manage, maintain and operate the railroads and properties of the said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, wherever situated, and to manage and conduct the business of said railroad companies, and to exercise such sundry other powers according to law and subject to the supervision and control of said Court as the Court might direct by other orders entered in said cause.

VII.

By reason of the premises your petitioners say that prior to the institution of this suit, to-wit, from the 2nd day of May, 1933, until and including the 30th day of June, 1933, petitioners The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company became and during the period named continued to be, in effect, agents and officers of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri; that by virtue of said orders said The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company lost their power to operate their railroad properties independently, and that they possessed the power to operate said properties only in such fashion as was directed and permitted by the said United States District Court, subject to its orders, supervision, control and direction, and not in such manner as might otherwise be prescribed by the officers and directors of said railroad companies. That on and after the first day of July, 1933, and prior to the institution of the suit first above described, your petitioners, L. W. Baldwin and Guy A. Thompson, became and have ever since been, and now are, the duly appointed, qualified and acting trustees of the said The Beaumont, Sour Lake & Western Railway Company, Debtor, and Houston North Shore Railway Company, Debtor, and of their, and each of their, railroads, lands, properties, estates, rights and franchises, and are now, and since the 1st day of July, 1933, have been, officers of the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and as such trustees, and such officers of Court, they were, prior to the institution of the suit first above described, in possession and entitled

to the possession of the lands, premises and properties described in plaintiff's petition in said suit.

VIII.

Wherefore, all of your petitioners aver that the said suit so filed in the District Court of Harris County, Texas, is a civil suit commenced in a Court of the State of Texas against your petitioners, and each of them, as officers of a Court of the United States, to-wit, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri and is a suit for and on account of acts done under color of the office of your petitioners, and each of them, and in the performance of the duties imposed upon your petitioners, and each of them, as such officers of Court; and the necessary effect of the institution and prosecution of said suit in said State Court is, and will be, to materially interfere with and obstruct the jurisdiction and powers of the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri with respect to the properties and assets of said debtors, The Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them.

WHEREFORE, premises considered, your petitioners, and each of them, pray that said suit, to-wit, No. C-211,736 on the docket of the District Court of Harris County, Texas, pursuant to Section 76 of Title 28 of the United States Code, shall be removed for trial into this Honorable Court, being the District Court of the Judicial District of the United States in which said cause is now pending, and, this Honorable Court being now in session, your petitioners pray that it issue a writ of certiorari to the said State Court requiring it to send to this

Honorable Court the record and the proceedings in said suit, and for such other orders and relief as your petitioners may be entitled to in the premises.

Respectfully submitted,

HOUSTON NORTH SHORE RAILWAY COMPANY,
THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY,
L. W. BALDWIN,
GUY A. THOMPSON,

By ANDREWS, STREETMAN, LOGUE & MOBLEY,
HARRY R. JONES,
ROBERT H. KELLEY,
Their Attorneys.

THE STATE OF TEXAS }
COUNTY OF HARRIS }

Before me, the undersigned authority, on this day personally appeared R. H. KELLEY, who being duly sworn deposes and says that he is a member of the firm of Andrews, Streetman, Logue & Mobley, General Attorneys for the above named petitioners; that he has read over the foregoing petition and that the facts therein stated are, within his knowledge, true, except such as are therein stated on information and belief, and them he verily believes to be true. Deponent further says, that he is an attorney duly licensed and qualified to practice law in the District Court of the United States for the Southern District of Texas; that as counsel for the petitioners he has examined the proceedings against them and carefully inquired into all the matters set forth in the foregoing petition and that he believes them to be true. Deponent says also that he is duly authorized

by the petitioners to execute, file and verify this petition on behalf of the petitioners.

R. H. KELLEY,

Sworn to and subscribed before me, this the 13th day of October, A. D. 1933.

(NOTARIAL SEAL) VIRGINIA RATLIFF,
Notary Public in and for
Harris County, Texas.

Exhibit 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

TYRRELL & GARTH INVESTMENT COMPANY, Plaintiff v. HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL., Defendants	In Equity No.....

Now come the petitioners in the above matter, L. W. Baldwin, Guy A. Thompson, Houston North Shore Railway Company and the Beaumont, Sour Lake & Western Railway Company, and in view of the objections contained in paragraphs I and II of the answer of Tyrrell & Garth Investment Company to the petitioners' petition for removal and certiorari, file the following amendment of and supplement to said petition for removal and certiorari, to-wit:

1—A copy of plaintiff's amended petition filed in the District Court of Harris County, Texas, referred to in paragraph I of said petition for removal, is attached to the said answer of Tyrrell & Garth Investment Company and is hereby referred to and made a part hereof.

2—There is attached hereto and made a part hereof, marked Exhibit "A", a true copy of the petition of Missouri Pacific Railroad Company for reorganization referred to in paragraph III of said petition for removal.

3—There is attached hereto and made a part hereof,

marked Exhibit "B," a true copy of the order referred to in paragraph IV of said petition for removal.

4—There is attached hereto, marked Exhibit "C" and made a part hereof, a true copy of the petition for reorganization of these petitioners and certain other railroad companies also referred to in paragraph III of said petition for removal.

5—There is attached hereto and made a part hereof, marked Exhibit "D", a true copy of the order referred to in paragraph V of said petition for removal.

6—There are attached hereto and made a part hereof, marked respectively Exhibits "E" and "F", copies of the orders of appointment referred to in paragraph VI of said petition for removal.

Petitioners pray that this amendment and the attachments hereto shall be deemed and treated as a part of their petition herein for removal and certiorari.

ANDREWS, STREETMAN, LOGUE & MOBLEY,
HARRY R. JONES,
ROBERT H. KELLEY,
Attorneys for Petitioners.

SWORN TO AND SUBSCRIBED before me by Robert H. Kelley, this 19th day of October, A. D. 1933.

(NOTARIAL SEAL)

VIRGINIA RATLIFF,
Notary Public in and for
Harris County, Texas.

Exhibit A

(Petition No. 1)

In the

DISTRICT COURT OF THE UNITED STATES
Eastern Division, Eastern Judicial District of Missouri

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor. } No. 6935.

PETITION

To the Honorable the Judges of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri:

The petition of Missouri Pacific Railroad Company, a railroad corporation organized and existing under the laws of the State of Missouri, hereinafter referred to as the Debtor, respectfully represents:

FIRST: That the Debtor is a railroad corporation duly organized and existing under the laws of the State of Missouri, and a citizen and resident of said

State, and is a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in the States of Missouri, Arkansas, Colorado, Illinois, Kansas, Louisiana and Oklahoma, and is not a street, suburban or interurban electric railway; that during the six months' period immediately preceding the filing of this petition the Debtor has had, and now has, its principal operating office in the City of St. Louis, Missouri, in the Eastern Division, Eastern Judicial District of Missouri.

SECOND: That there will become due on April 1, 1933, and within thirty days thereafter, the following:

Interest on obligations of the Debtor, due April 1, 1933, aggregating	$ 1,110,411.92
Taxes on property of the Debtor which will become subject to a penalty if not paid by April 10, 1933 (approximately)	1,295,000.00
Principal of, and interest on, obligations of the Debtor, or obligations which constitute a lien upon its property due April 30/May 1, 1933	38,183,918.86
Total	$40,589,330.78

That the Debtor is without funds to pay and discharge the aforesaid obligations as they mature, and on information and belief alleges that it has no means of borrowing or otherwise procuring such funds; that it is unable to meet its debts as they mature, and desires to effect a plan of reorganization, pursuant to

Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

THIRD: That a copy of this petition is this day being filed with the Interstate Commerce Commission.

FOURTH: That the filing of this petition was duly authorized by the Debtor by resolution of the Executive Committee of the Board of Directors of the Debtor, adopted at a meeting thereof duly held on the 31st day of March, 1933.

Wherefore, your petitioner prays that an order may be entered approving this petition as properly filed under said Section 77, and that it be granted all other and further relief to which it may be entitled.

MISSOURI PACIFIC RAILROAD COMPANY,
By L. W. BALDWIN,
President.

HERBERT FITZPATRICK,
JOHN P. MURPHY,
PAUL J. BICKEL,
EDW. J. WHITE,
Attorneys for Debtor,
13th & Olive Sts.,
St. Louis, Missouri.

United States of America,
Eastern Judicial District of Missouri, } ss:
City of St. Louis, Missouri.

L. W. Baldwin, being duly sworn, deposes and says that he is an officer, to-wit, the President, of Missouri Pacific Railroad Company, a corporation, the petitioning Debtor mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

L. W. Baldwin.

Subscribed and Sworn to before me this 31st day of March, 1933.

Geo. W. Collins,
(Notarial Seal) Notary Public.

My commission expires June 27, 1933.
Filed March 31st, 1933. Jas. J. O'Connor, Clerk.

Exhibit B

(Order No. 1)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor. } No. 6935.

ORDER

Upon due consideration of the petition of Missouri Pacific Railroad Company, the above named Debtor, verified March 31, 1933, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said Section and has been filed in good faith, it is Ordered:

(1) That said petition be, and it hereby is, approved as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the Debtor be, and it hereby is, authorized and directed, pending further order of this Court in the premises, to run, manage, maintain, operate and

keep in proper condition and repair the railroads and property of the Debtor, wherever situated, whether in this state, judicial circuit, or elsewhere, and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, to collect and receive the income, rents, revenues, tolls, issues and profits of said property, to collect all outstanding accounts and all dividends and interest on securities belonging to it, to make such advances to its subsidiary corporations as are necessary to protect the Debtor's interest therein, all in the same manner that it would be entitled and bound to do in its own right, and to the extent necessary to protect and preserve the property of the Debtor to make and pay for additions and betterments to the railroads and property of the Debtor, all according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein. The Debtor is authorized in its discretion from time to time until further order of this Court out of funds now or hereafter coming into its hands to pay:

(a) All taxes and assessments due or to become due upon the property of the Debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the Debtor, including among other expenses the wages, salaries and compensations of all officers, attorneys, counsel, managers, superintendents, agents or employees retained by the Debtor, ticket,

traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs as may become due to connecting or other railroad companies or other common carriers, including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facilities, and such sums as may be necessary to comply with the obligations of the Debtor under contracts by virtue of which said occupation or use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or of any of them):

(c) The following claims incurred by the Debtor within six months preceding the date of this order, to-wit: Wages, salaries, fees and other charges due and payable for services rendered to the Debtor in the usual and customary operation of its properties and the conduct of its current business, unpaid material and supply accounts incurred in the operation of said properties, unpaid and outstanding pay checks and wage checks representing labor actually performed for the Debtor, and unpaid ticket, traffic, car mileage and car per diem balances, interline accounts, freight and overcharge claims and amounts for car and equipment repairs incurred by the Debtor;

(d) The cost of maintaining the corporate existence of the Debtor, including the necessary ex-

penses of the preservation of records, and the registration and transfer of its stocks and bonds and trustee's charges under indentures under which securities of the Debtor have been issued.

(3) The Debtor shall close its present books of account as of the close of business on March 31, 1933. The Debtor shall open new books of account as of the opening of business on April 1, 1933, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected by and approved by this Court.

(4) Within forty days after the entry of this order, the Debtor shall file with the Clerk of this Court a statement of the Assets and Liabilities of the Debtor as of the close of business on March 31, 1933, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of the Assets and Liabilities of the Debtor as of the close of business on the last day of the preceding month together with a summary statement of the revenues and expenses of the Debtor of the preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(5) This Court reserves full right and jurisdiction to make from time to time such orders as the Court

shall deem proper, appointing a trustee or trustees of all of said Debtor's property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of said Debtor, fixing the time within which any plan of reorganization shall be proposed, accepted and confirmed, requiring the Debtor to file such schedule and submit such information as may be necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

C. B. FARIS,
District Judge.

Dated March 31, 1933.
Filed March 31st, 1933. Jas. J. O'Connor, Clerk.

Exhibit C.

(Petition No. 11.)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	No. 6935. In Proceedings for the Reorganization of a Railroad.

PETITION

Of Missouri Pacific Railroad Corporation in Nebraska et al.

To the Honorable the Judges of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri:

The petition of: Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; The St. Louis, Brownsville and Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company; and Houston North Shore Railway Company, Debtors, respectfully represents:

First: That Missouri Pacific Railroad Company, Debtor, a railroad corporation duly organized and existing under the laws of the State of Missouri, owns directly all of the capital stock, having power to vote for the election of directors of Missouri Pacific Railroad Corporation in Nebraska, Debtor, a railroad corporation duly organized and existing under the laws

of the State of Delaware, and a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in the State of Nebraska.

Second: That Missouri Pacific Railroad Company, Debtor, owns approximately 94 per cent of the capital stock having power to vote for the election of directors of New Orleans, Texas and Mexico Railway Company, Debtor, a railroad corporation duly organized and existing under the laws of the State of Louisiana; and that said New Orleans, Texas and Mexico Railway Company, Debtor, owns directly all of the capital stock having power to vote for the election of directors of the following corporations, with the result that Missouri Pacific Railroad Company, Debtor, owns indirectly, through an intervening medium, more than a majority of the capital stock having power to vote for the election of directors of said corporations, namely:

The Beaumont, Sour Lake and Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, San Antonio, Uvalde and Gulf Railroad and Houston North Shore Railway Company, Debtors, all of which are railroad corporations duly organized and existing under the laws of the State of Texas, and common carriers by railroad engaged in, or whose property is operated in, the transportation of persons and property in interstate commerce in the State of Texas.

Third: That heretofore on March 31, 1933, said Missouri Pacific Railroad Company, Debtor, filed in this Court in the above entitled proceeding, a petition stating that it is unable to meet its debts as they mature and that it desires to effect a plan of reorganiza-

tion pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy; that on March 31, 1933, this Court entered an order herein approving said petition as properly filed under said Section 77.

Fourth: That each of the Debtors joining in this petition is without sufficient funds to pay and discharge its obligations, and is unable to meet its debts as they mature; and each desires to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company referred to in said petition of that Company, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

Fifth: That a copy of this petition will forthwith be filed with the Interstate Commerce Commission.

Sixth: That owing to the large number of creditors of the Debtors joining in this petition and the great amount of clerical and other labor required to make complete lists of creditors and other information required by clause (c) of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, it is not practicable to prepare said lists within fifteen days and that for that reason the Debtors desire an extension of said time.

Seventh: That the filing of this petition by the Debtors joining herein was duly authorized by said Debtors by resolutions of their respective Boards of Directors or the respective Executive Committees of their Boards of Directors, thereunto duly authorized.

Wherefore, the Debtors hereinabove mentioned pray that an order may be entered herein approving this

petition as properly filed by each of said Debtors under said Section 77 and that they may each be allowed to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, referred to in said petition of said Debtor, that the time to prepare the lists of bondholders, creditors and stockholders of the Debtors joining in this petition be extended to June 15, 1933, and that the Court will enter and appropriate order granting to all of the Debtors who are parties to this proceeding such rights and powers as may be requisite for the carrying on of their business and the preservation of their properties, and that all of the Debtors be granted all other and further relief to which they may be entitled.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,
THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY,
THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,
SAN ANTONIO, UVALDE AND GULF RAILROAD COMPANY,
HOUSTON NORTH SHORE RAILWAY COMPANY,

L. W. BALDWIN,
President.

PAUL J. BICKEL,
THOS. T. RAILEY,
EDW. J. WHITE,
Attorneys for said Debtors.
13th and Olive Streets,
St. Louis, Missouri.

United States of America,
Eastern Judicial District of Missouri } ss.
City of St. Louis, Missouri.

L. W. Baldwin, being duly sworn, deposes and says that he is an officer, to wit, the President of Missouri Pacific Railroad Corporation in Nebraska, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, San Antonio, Uvalde & Gulf Railroad Company and Houston North Shore Railway Company, corporations, petitioning Debtors mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and facts stated therein with respect to said corporations are true.

L. W. BALDWIN.

Subscribed and sworn to before me this 1st day of May, 1933.

GEO. W. COLLINS,
(Seal) Notary Public.

My commission expires June 27th, 1933.
Filed May 2, 1933. Jas. J. O'Connor, Clerk.

Exhibit D.

(Order No. 11)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	No. 6935. In Proceedings for the Reorganization of a Railroad.

ORDER

On Petition of Missouri Pacific Railroad Corporation in Nebraska et al.

Upon due consideration of the petition of: Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; St. Louis, Brownsville and Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company, and Houston North Shore Railway Company, Debtors, verified May 1, 1933, and filed herein under Section 77 of Chapter VIII of Acts of Congress relating to bankruptcy, showing that more than a majority of the capital stock of the Debtors joining in said petition is owned by Missouri Pacific Railroad Company, Debtor, either directly or indirectly through an intervening medium, and showing further that the Debtors joining in said petition are unable to meet their debts as they mature, and that they desire to effect a plan

of reorganization in connection with, or as a part of, the plan of reorganization of Missouri Pacific Railroad Company, Debtor, pursuant to said Section 77, and the Court being satisfied that said petition complies with said Section 77 and has been filed in good faith, it is Ordered:

(1) That said petition of Missouri Pacific Railroad Corporation in Nebraska et al., Debtors, be, and it is hereby approved, as to each and all of the Debtors joining therein, as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and in this proceeding in which the petition of Missouri Pacific Railroad Company has been filed.

(2) That the order heretofore entered herein on March 31, 1933, with respect to operating of railroads and other property of Missouri Pacific Railroad Company, payments of taxes, expenses, six months claims, and other items, and the exercise of other powers and privileges as therein set forth, and the orders entered herein on April 7, 1933, with respect to payments to pensioned employes and settlement of prior interline and certain other accounts, and the order entered herein on April 15, 1933, with respect to honoring of outstanding pay checks, are hereby extended to and made applicable to all the Debtors parties hereto.

(3) That the Debtors joining in the petition, hereby approved, of Missouri Pacific Railroad Corporation in Nebraska et al., shall close their present books of accounts as of the close of business on April 30, 1933, and shall open new books of account as of the opening of business on the following day, and cause to be kept therein due and proper accounts of the earnings,

expenses, receipts and disbursements of the Debtors, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into their hands in such of the banks in which funds of the Debtors are presently deposited as shall be selected by the respective Debtors, or in such other bank or banks as shall be selected by them and approved by this Court.

(4) That within forty days after the entry of this order, the Debtors joining in said petition shall file with the Clerk of this Court a statement of their assets and liabilities as of the close of business on April 30, 1933, and on or before the last business day of each calendar month thereafter shall file with said Clerk a statement of their assets and liabilities as of the close of business on the last day of the preceding month together with a summary statement of their revenues and expenses of such calendar month. Such statements may be made on a consolidated basis as to any Debtors all of whose capital stock is owned by any other Debtor. All such statements shall be certified as correct by the chief accounting officer of the respective Debtors.

(5) That for cause shown, the time within which the Debtors joining in said petition shall prepare the lists of their bondholders, creditors, and stockholders, and other information required by clause (c) of Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy is hereby extended to June 15, 1933.

(6) That this Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, appointing a trustee or trus-

tees of the Debtors' property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of the Debtors, fixing the time within which any plan of reorganization shall be proposed, accepted, and confirmed, requiring the Debtors to file such schedules and submit such information as may be necessary to disclose the conduct of the Debtors' affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed and the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting, or otherwise modifying this order as to the Court may at any time seem proper.

C. B. FARIS,
District Judge.

Dated May 2d, 1933.
Filed May 2, 1933. Jas. J. O'Connor, Clerk.

Exhibit E.

(Order No. 40)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	In Proceedings for the Reorganization of a Railroad. No. 6935.

ORDER APPOINTING TRUSTEES

It appearing to the Court that it is advisable at this time to appoint Trustees of the estates of all of the Debtors heretofore or hereafter made parties to this proceeding, and it appearing further that the Interstate Commerce Commission has selected and designated a panel of standing trustees, qualified for service as such, pursuant to subdivision (c) of Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy, which panel contains the names of L. W. Baldwin and Guy A. Thompson, both of St. Louis, Missouri, It Is Ordered:

1. That the said L. W. Baldwin and Guy A. Thompson be and they are hereby appointed temporarily Trustees of all and singular the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of Missouri Pacific Railroad Company; New Orleans, Texas & Mexico Rail-

way Company; International-Great Northern Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; The Beaumont, Sour Lake & Western Railway Company; St. Louis, Brownsville & Mexico Railway Company; San Antonio, Uvalde & Gulf Railroad Company; and Houston North Shore Railway Company, Debtors; which appointment, as well as the other provisions of this order, shall be effective as of the beginning of business on July 1, 1933. Such appointment shall also apply to the estates of all Debtors hereafter becoming parties to this proceeding, from and after the respective dates of approval of the petitions of such subsequent Debtors. The said Trustees shall have all of the title, and subject to the control of this Court and consistently with the provisions of Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy shall exercise all of the powers of Trustees appointed pursuant to Section 44 or any other section of the Acts of Congress relating to Bankruptcy.

2. That said Trustees shall have all of the powers, rights and privileges heretofore granted to or conferred upon the respective Debtors, or any of them, pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders heretofore entered in this proceeding shall, with respect to the Trustees and the property in their possession, be of like force and effect as though said Trustees were therein specifically named in place of said respective Debtors, all of said orders being hereby incorporated in and made a part of this order by reference. The Trustees shall pay out of the funds coming into their hands, as such Trustees, the cost of

maintaining the corporate organization of the Debtors, in addition to the necessary expense of preserving their records, registration and transfer of their stocks and bonds, and Trustees' charges under indentures under which securities of the Debtors have been issued.

3. That within ten (10) days from and after July 1, 1933, said Trustees shall each execute and file with the Clerk of this Court a bond or bonds with one or more sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of $50,000, conditioned to the effect that they will well and truly perform the duties of their office, and duly account for all moneys and property whatsoever which may come into their hands, and abide by and perform all things which they shall be directed by the Court to do.

4. That the Debtors shall give notice to their creditors and stockholders of a hearing to be held before the undersigned Judge, in the Court Room of the United States District Court, Federal Building, St. Paul, Minnesota, on the 25th day of July, 1933, at eleven o'clock in the forenoon, Central Standard Time, to determine whether such appointment of said Trustees shall be made permanent or shall be terminated, or a substitute Trustee or Trustees or an additional Trustee or Trustees shall be appointed by the Court, by publishing notice of such hearing once a week for two consecutive weeks in one daily newspaper published and of general circulation in each of the cities of St. Louis and Kansas City, Missouri; Houston, Texas; Omaha, Nebraska; Little Rock, Arkansas; New Orleans, Louisiana, and New York, New York.

5. That all persons, firms and corporations having in their possession any of the property of the Debtors

are hereby ordered to deliver the same to the Trustees, and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employees of the Debtors is hereby required to turn over and deliver to said Trustees, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control belonging to or in the possession of the Debtors, and to abide by and conform to such orders as may be given from time to time by said Trustees, or their duly constituted representatives, in conducting the operation of the properties of the Debtors and in the discharge of their duties as Trustees.

6. That the Court reserves full right and jurisdiction to make from time to time such additional orders herein as to the Court shall seem proper, as well as any orders amplifying, extending, limiting or otherwise modifying this order, and in all respects to regulate and control the conduct of said Trustees.

C. B. FARIS,
District Judge.

Dated June 22d, 1933.

Filed June 22, 1933. Jas. J. O'Connor, Clerk.

Exhibit F.

(Order No. 57)

In the

DISTRICT COURT OF THE UNITED STATES,
Eastern Division, Eastern Judicial District of Missouri

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor.	No. 6935. In Proceedings for the Reorganization of a Railroad.

ORDER

Confirming Appointment, Entered June 22, 1933, Temporarily Appointing Trustees

---

On March 31, 1933, the Missouri Pacific Railroad Company, Debtor, filed its petition herein, stating that Debtor was unable to meet its obligations as they matured and would mature and that it desired to effect a plan of reorganization, in accordance with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy.

The Court, being satisfied that said petition complied with said section of the Act and that it was filed in good faith, thereupon, on March 31, 1933, approved said petition as properly filed, under said section of the Act, and entered an order, authorizing the Debtor, pending further order of this Court in the premises, to operate and maintain the railroads and property

of the Debtor, wherever situated, and to manage and conduct its business, and to exercise general and specified powers, according to law, and subject to such supervision and control by the Court as the Court might exercise by further orders entered herein.

Subsequent to said date, petitions having been filed by various subsidiaries of said Missouri Pacific Railroad Company, Debtor, in this cause, and the Court, having fully considered said petitions, approved the same as properly filed under said section of the Act and entered orders authorizing said Debtors, pending the further order of this Court, in the premises, to continue to operate and maintain the railroads and property of said Debtors, wherever situated, and to manage and control the business of said Debtors and to exercise the different, sundry powers, according to law, specified in said orders, subject to the supervision and control of this Court as the Court might exercise by further orders entered herein.

On June 22, 1933, pursuant to the provisions of Section 77 of said Act, this Court entered an order, temporarily appointing L. W. Baldwin and Guy A. Thompson, both of St. Louis, Missouri, as temporary Trustees for the railroads and properties of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of all of said Debtors, said Trustees having been selected from a panel of standing trustees, designated and qualified for service as such, pursuant to sub-division (c) of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy. said order, appointing Trustees, to be effective as of the beginning of business on July 1, 1933, and said order specifying that such appointment should apply

to the estates of all Debtors hereafter becoming parties to this proceeding from and after the respective dates of approval of the petitions of such subsequent Debtors.

And said order, temporarily appointing said Trustees, having provided that notice should be published once a week for two, consecutive weeks in one, daily newspaper of general circulation in each of the Cities of St. Louis, and Kansas City, Missouri; Houston, Texas; Omaha, Nebraska; Little Rock, Arkansas; New Orleans, Louisiana, and New York, New York, notifying all persons, firms and corporations having in their possession any of the property of the Debtors to deliver the same to the Trustees, and notifying the creditors and stockholders of said Debtors that, on the 25th day of July, 1933, at eleven o'clock in the Forenoon, Central Standard Time, the undersigned Judge, in the Court Room of the United States District Court at the Federal Building in St. Paul, Minnesota, would determine whether such appointment of such Trustees should be made permanent or should be terminated or a substitute Trustee or Trustee should be appointed by the Court, and, it appearing to the Court that, within ten days from and after July 1, 1933, each of said Trustees executed and filed with the Clerk of the United States District Court for the Eastern Division, Eastern Judicial District Missouri, a bond, with solvent sureties, in the sum of fifty thousand dollars ($50,000.00), each, conditioned, as required in said order temporarily appointing said Trustees, entered June 22, 1933, and it further appearing to the Court that said Debtors have filed with the Court their report of compliance with said order, and that all known creditors and stockholders of the Debtors have been

notified of this hearing, in accordance with the provisions of Section 77 of Chapter VIII of said Act, and this hearing being now held in accordance with said notice and the provisions of said Act, and certain creditors and stockholders of the Debtors having appeared by Counsel at this hearing, and the Court, having heard the arguments of said Counsel, and being duly advised in the premises and being of the opinion that the interests of all parties will be best conserved by affirming, until the further order of this Court, the order entered by the Court herein on June 22, 1933, temporarily appointing said L. W. Baldwin and Guy A. Thompson, Trustees of the railroads and properties of said Debtors; it is, therefore,

Ordered, Adjudged and Decreed that said order temporarily appointing said L. W. Baldwin and Guy A. Thompson, Trustees for the railroads and properties of said Debtors, entered June 22, 1933, Be, and the Same Is Hereby, Confirmed and Approved, and said appointment of said Trustees is hereby made permanent, and the said L. W. Baldwin and Guy A. Thompson are hereby appointed permanent Trustees of, all and singular, the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situated, of the

Missouri Pacific Railroad Company,
New Orleans, Texas & Mexico Railway Company,
International-Great Northern Railroad Company,
Missouri Pacific Railroad Corporation in Nebraska,
The Beaumont, Sour Lake & Western Railway Company,
The St. Louis, Brownsville and Mexico Railway Company,

San Antonio, Uvalde & Gulf Railroad Company,
Houston North Shore Railway Company
and
Missouri-Illinois Railroad Company,

and such appointments shall also apply to the estates of all Debtors hereafter becoming parties to this proceeding from and after the respective dates of the approval of the petitions of such subsequent Debtors.

And said Trustees shall have all the title and be subject to the control of the Court and, consistently with the provisions of Section 77 of Chapter VIII of the Act of Congress relating to bankruptcy, shall exercise all of the powers of trustees appointed pursuant to Section 44 or any other section of the Act of Congress relating to bankruptcy.

Such Trustees shall have all of the powers, rights and privileges heretofore granted to or conferred upon them while temporary Trustees, and all of the rights, powers and privileges heretofore granted to or conferred upon the respective Debtors, or any of them, pursuant to any or all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders entered in this proceeding shall, with respect to the Trustees and the properties in their possession, be of like force and effect as though said Trustees were therein specifiically named, instead of said respective Debtors, all of said orders being herein incorporated in and made a part of this order by reference.

And all persons, firms and corporations having in their possession any of the property of the Debtors or any of the property of the Debtors subsequently becoming parties to this proceeding are hereby ordered to deliver the same to said Trustees and to make such

transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employes of the Debtors are hereby required to turn over and deliver to said Trustees, or their duly constituted representatives or agents, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control, belonging to or in the possession of any of said Debtors; and to abide by and conform to such orders as may be given from time to time by said Trustees, or their duly constituted representatives, in conducting the operations of the Debtors, and in the discharge of their duties as such Trustees.

And such Trustees are hereby authorized and directed to run, manage, maintain and, operate the railroads and properties of the Debtors, wherever situated, and to manage and conduct the business of each of said respective Debtors, and to exercise such sundry other powers according to law and subject to the supervision and control of the Court as the Court may exercise by other orders entered herein, all as set forth in the order of this Court temporarily appointing said Trustees, entered June 22, 1933, and in the supplemental order appointing Trustees, entered June 30, 1933, and in the order granting Trustees authority to employ Attorneys, entered July 1, 1933.

And the Court reserves full right and jurisdiction to make, from time to time, such other and further orders as the Court shall deem proper, amplifying, extending, limiting or otherwise modifying such orders of June 22, 1933, temporarily appointing said Trustees, and said orders of June 30, 1933, and July 1,

1933, and, in all respects, to regulate and control the conduct of said Trustees.

C. B. FARIS,
U. S. District Judge.

Dated: St. Paul, Minn., July 25, 1933.
Received and filed Jul. 26, 1933.
Jas. J. O'Connor, Clerk.

Exhibit 3.

IN THE DISTRICT COURT OF UNITED STATES FOR THE SOUTHERN DIVISION OF TEXAS, HOUSTON DIVISION.

TYRRELL & GARTH INVESTMENT COMPANY, Plaintiff VERSUS HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL., Defendants	In Equity No.....

TO THE HONORABLE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON:

Now comes Tyrrell & Garth Investment Company in the above styled cause, through its attorneys, and says:

I.

The said petition for removal is insufficient because the allegations therein contained with respect to what the records show as contained in the petition for re-organization of the Missouri Pacific Railroad Company filed in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri (as well as the subsequent proceedings, orders and judgments claimed to have been entered therein) are the conclusions of the pleader; that unless certified copies or other duly authenticated copies of said proceedings are attached to the said petition for removal, it is impossible for the court to know what said orders, decrees and judgments of the District Court for the Eastern Division of the Eastern Judicial District of Mis-

souri actually show. The allegations of the petition for removal as to what said orders, judgments and decrees are in said United States District Court are merely the result of counsel's interpretation thereof, and are therefore the conclusions of the pleader.

Said Tyrrell & Garth Investment Company, through its attorneys, say that not until the 17th day of October, 1933, was its attorneys furnished a copy of the said application of petitioners, and that since said time and owing to the shortness of time, it has necessarily been wholly impossible for its counsel to see or inspect any of the records pending in said United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, nor has its counsel had access to what purports to be copies of any such records. Both the counsel and the court are entitled to have and inspect certified or authenticated copies of said proceedings in said United States District Court in order that this court may judge as to the correctness of the petitioners' conclusions as to what are the effects of said orders and decrees in said Missouri Court.

II.

Said Tyrrell & Garth Investment Company, through its counsel, says that it is not advised as to the correctness of the petitioners' allegations as to the proceedings had in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and the insufficiency of petitioners' application to have this cause removed is hereby set up because such instruments as are relied upon in said petition are not in fact attached to said petition.

III.

Your respondent Tyrrell & Garth Investment Com-

pany further says that it appears from the face of plaintiffs' petition for removal that the same is insufficient and states no grounds for removal and that said petition should therefore be dismissed or the application for removal denied by this court.

IV.

For other and further reply herein respondent says that on the 18th day of October, 1933, it has dismissed in the State Court so much of its petition as seeks an injunction against the defendants L. W. Baldwin and Guy A. Thompson in their official capacities and the Houston North Shore Railway Company and the Beaumont, Sour Lake & Western Railway Company, and respondent attaches hereto a certified copy of said order of dismissal in so far as said petition in the State Court seeks any injunction against said parties.

V.

Respondent says that the facts set up by said petition for removal do not legally disclose any proper grounds therefor, nor do said petitioners bring themselves within any provision of the law justifying the removal of this cause from the State Court into this Court.

There is attached hereto certified copy of plaintiff's First Amended Original Petition in the State Court. Plaintiff's petition, in accordance with said certified copy of the order of the State Court attached hereto, will be amended before trial so as not to seek an injunction against petitioners so long as they lawfully exercise jurisdiction over their property under control of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

WHEREFORE, it is prayed that said petition for removal

be dismissed as without merit and as containing insufficient grounds for such removal, or that said application be denied upon its merits.

FRANKLIN & BLANKENBECKER,
Attorneys for
Tyrrell & Garth Investment Company.

STATE OF TEXAS,
COUNTY OF HARRIS.

BEFORE ME, the undersigned authority, on this day personally appeared, L. E. BLANKENBECKER, who being by me duly sworn says that he is a member of the firm of Franklin & Blankenbecker, attorneys for Tyrrell & Garth Investment Company; that he has read over the foregoing answer and the facts therein stated are within his knowledge true, except in so far as relates to legal contentions and propositions, and as to the latter he believes the same to be correct.

L. E. BLANKENBECKER.

SUBSCRIBED AND SWORN to before me this the 19th day of October, A. D. 1933.

(Notarial Seal)

S. B. CLARK,
Notary Public in and for
Harris County Texas.

TYRELL & GARTH INVESTMENT COMPANY, vs. HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL.	No. 211736. IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, SIXTY-FIRST JUDICIAL DISTRICT.

The plaintiff Tyrell & Garth Investment Company in open court having made known, through its attorneys, its desire to dismiss so much of the prayer in its amended petition on file herein as seeks to enjoin the defendants L. W. Baldwin and Guy A. Thompson in their official capacity as trustees in bankruptcy of the Houston North Shore Railway Company and the Beaumont Sour Lake & Western Railway Company and their prayer as well for injunction against said defendant Railway Companies, on account of said defendant railway companies being in bankruptcy under amendment to the bankruptcy Acts of Congress of 1933, pending in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri and of which railroad companies said L. W. Baldwin and Guy A. Thompson are the trustees under appointment of said court;

IT IS NOW ORDERED, ADJUDGED AND DECREED, on motion of plaintiff's attorneys, that so much only of said cause of action as contained in plaintiff's amended petition as at this time seeks such injunction be and the same is hereby dismissed, without prejudice to the plaintiff hereafter to seek such injunction against said defendant railway companies when and if they shall be discharged from jurisdiction and control of said United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, but that otherwise plain-

tiff's amended petition and prayer and cause of action shall be in all things unchanged and unaffected by this order, and plaintiff will be hereafter required to file an amended petition in which said prayer for injunction only will be omitted, and shall not otherwise renew the same in this cause until an injunction in this cause from this court will not unlawfully interfere with the jurisdiction and control of said railway defendants and said Trustees by said United States District Court for the Eastern Division for the Eastern Judicial District of Missouri, so long as it lawfully exercises jurisdiction and control of the property of said railroad defendants.

.....,

Judge.

TYRRELL & GARTH INVESTMENT COMPANY, vs. HOUSTON NORTH SHORE RAILWAY COMPANY, ET AL.	No. 211/36 IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, SIXTY-FIRST JUDICIAL DISTRICT.

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Tyrrell & Garth Investment Company, a joint stock association created by Declaration of Trust bearing date the 1st day of January, 1927, and recorded in the Deed Records of Harris County, Texas, in vol. 690 p. 528 *et seq.*, a resident of Harris County, Texas, hereinafter called plaintiff, and with leave of the Court first had, files its First Amended Original Petition, and complains of Houston North Shore Railway Company, a corporation created and existing under and by virtue of the laws of the State of Texas, with its residence and principal place of business in Harris County, Texas, and of Beaumont Sour Lake & Western Railway Company, a corporation created and existing under and by virtue of the laws of the State of Texas, with its residence and principal place of business in Harris County, Texas, and of L. W. Baldwin and Guy A. Thompson, who reside in St. Louis, Missouri, as Trustees of said railway defendants, under appointment of the District Court of the United States of the Eastern Division, Eastern Judicial District of Missouri, in cause No. 6935, in the Matter of Missouri Pacific Railroad Company, in proceedings for the Reorganization of a Railroad under the amendments to the Bankruptcy Act of Congress of 1933 (hereinafter referred to as Trustees), and of Harry K. John-

son, who resides in Harris County, Texas, hereinafter called defendants, and for cause of action plaintiff respectfully represents:

I.

That heretofore to-wit: on the ..... day of ....., 1925, W. C. Tyrrell Trust, a joint stock association, was the owner of several thousand acres of land located about sixteen miles East of Houston in Harris County, Texas, and described generally as Elena Fruit & Cotton Farms. Said W. C. Tyrrell Trust being desirous of having an interurban railroad constructed to and through said property from Houston, in Harris County, to Baytown and Goose Creek, in Harris County, Texas, for the purpose of materially adding to the value of its lands, entered into a certain contract in writing at said time with Harry K. Johnson, whereby it was agreed that said W. C. Tyrrell Trust would convey to said Johnson a right of way for the proposed interurban railroad over and across the lands of said W. C. Tyrrell Trust, in the form of an easement, subject to forfeiture for non-user for the purpose of an interurban railroad. Such non-user was in said instrument described and defined as being a failure to operate as an interurban railroad for a period of 30 successive days, exclusive of such time as operations might be prevented by conditions over which said Johnson had no control. It was provided in said contract that operation as an interurban railroad must include a passenger schedule over which first class coaches, operated by electric or gas engines, must be run over the entire line on a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight. It was further in

said contract provided that in the event of forfeiture of said right of way, all buildings erected thereon should become the property of the W. C. Tyrrell Trust without the necessity of an accounting therefor and as liquidated damages. It was further agreed that in the event of forfeiture of the right of way, all buildings erected thereon should become the property of W. C. Tyrrell Trust as liquidated damages, but said Johnson was therein granted the privilege of removing all rails and attachments, all over head construction and electric equipment, such removal to be accomplished within 90 days from the date of forfeiture, or the same should likewise become the property of said W. C. Tyrrell Trust as liquidated damages. As a further consideration for said contract said W. C. Tyrrell Trust agreed to convey and did thereafter convey to said Johnson all the lands owned by it in the Jesse White and Henry White Surveys, lying West of the Crosby-Lynchburg shell road, being about 1100 acres, excepting 100 acres out of the Jesse White Survey adjacent to said road, and also sold to said Johnson three or four thousand acres of additional lands. Copy of said contract is hereto attached as a part hereof and marked "Exhibit A."

II.

Plaintiff alleges that said contract was entered into and performed, according to its terms, by the W. C. Tyrrell Trust for the purpose of inducing the construction and permanent operation of an interurban railway across said property between Houston, Texas, and Baytown and Goose Creek, Texas, in order to materially add to the value of its lands, as recited therein. Plaintiff alleges that said railway was afterwards constructed by

the said Harry K. Johnson and/or the defendants Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway Company, which latter two succeeded to the ownership, rights and obligations of said Johnson, the said Houston North Shore Railway having acquired ownership and control of said railway and all rights and obligations of Johnson in connection with said railway before its completion and having thereafter leased the same, under terms unknown to plaintiff, to the defendant, Beaumont, Lour Lake & Western Railway Company.

III.

Plaintiff alleges that thereafter on or about the 31st day of December, 1926, by instruments recorded in vol. 694, pp. 311-14 of the Deed Records of Harris County, Texas, the plaintiff Tyrrell & Garth Investment Company became the owner of all the lands and properties and the successor in interest and ownership of the W. C. Tyrrell Trust in and to all the lands described in said contract between W. C. Tyrrell Trust and Harry K. Johnson, and plaintiff is now the owner and holder of the same and is the successor in interest of all the rights, privileges and interest which the said W. C. Tyrrell Trust ever had and owned in connection with the execution of said contract.

VI.

Plaintiff alleges that in pursuance of said written contract W. C. Tyrrell Trust, acting therein by and through H. C. Tyrrell, its duly authorized and empowered trustee so to do, executed and delivered to said Harry K. Johnson a certain right of way easement or

conveyance, dated the 5th day of October 1925, which is recorded in vol. 689 p 465 of the Deed Records of Harris County, Texas, by the terms of which said W. C. Tyrrell Trust for a valuable consideration therein mentioned granted, sold and conveyed unto Harry K. Johnson, his heirs and assigns, the following described property, to-wit:

"The free and uninterrupted use, liberty and privilege of passage in and along a certain way across lands located in Harris County, Texas, on the waters of the San Jacinto River, about ..... miles of ..... of Houston sixty feet in width, the center line of which is described as follows:

"Commencing at a stake in the East side of the Crosby and Lynchburg road 960 feet South of the intersection of the said Crosby and Lynchburg public road and the Wallisville public road on North line of the Jessie White Survey;

"Thence East along the center of the said right of way parallel to the Wallisville road 588 feet;

"Thence to the right around a six (6) degree curve to a stake thirteen hundred and five (1305) feet from the point of beginning;

"Thence South forty eight (48) degrees east along the center of said right of way to a stake thirty one hundred and fifty three (3153) feet from the point of beginning;

"Thence to the left around a six (6) degree curve passing from the point of beginning;

"Thence to the left around a six (6) degree curve passing the East line of the Jessie White thirty six hundred and eighty eight (3688) feet;

"Thence to a stake thirty eight hundred and sixty six (3866) feet from point of beginning;

"Thence East parallel and adjacent to the public road to a stake which is eighty two hundred and forty (8240) feet from point of beginning;

"Thence to the right around a six (6) degree curve to a stake which is eighty seven hundred and forty (8740) feet from the point of beginning;

"Thence South fifty (50) degrees East along the center of the said right of way passing the North line of the William Hilbus survey at eleven thousand four hundred and ninety one (11,491) feet;

"Thence on said course to a stake which is thirteen thousand one hundred and forty two (13,142) feet from point of beginning;

"Thence to the right around a four (4) degree curve to a stake which is fourteen thousand six hundred and sixty (14,660) feet from the point of beginning;

"Thence South parallel and adjacent to the public road along the center of the said right of way to a stake which is twenty three thousand eight hundred and eighty nine (23,889) from the point of beginning and on the boundary line between the Elena Farms and the Busch tract, containing thirty two and nine tenths (32.9) acres;

"First thirty six hundred and sixty eight (3668) feet is in the Jessie White Survey containing five and five one hundredths (5.05) acres, the next seven thousand eight hundred and twenty three (7,823) feet lies in the Sanford Rice Survey and contains ten and seventy seven hundredths (10.77) acres, the last twelve thousand three hundred and ninety eight (12,398) feet lies in the William Hilbus Survey, and contains seventeen and eight one hundredths (17.08) acres."

It was in said deed expressly provided that the right of way and occupancy of the land above described were granted upon specific conditions of forfeiture and should be forfeited in the event of failure at any time to operate thereon an interurban railroad for a period of 30 successive days, exclusive of such times as operation might be

prevented by conditions over which grantee had no control; and it was further provided and defined in said deed that operation as an interurban railroad, as therein contemplated, must include a passenger schedule with first class coaches operated by electricity or gas engines passing over the entire right of way therein granted or thereafter granted by the W. C. Tyrrell Trust or its successor said Harry K. Johnson; said coaches to be operated under a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight.

It was further stipulated in said conveyance that the parties were aware of the tendency of the courts to construe declarations of forfeiture as conditions rather than forfeiture provisions, and the same declared that it was intended thereby, in the grant of the said easement, that a forfeiture was intended in the event the conditions above stated were violated by the grantee. It was further therein provided that in event of forfeiture of the right of way, all buildings erected thereon should become the property of grantor, without the necessity of an accounting, and as liquidated damages; the grantee being given the privilege of removing all rails and attachments, all overhead construction and electric equipment, provided such removal was accomplished within ninety days from date or forfeiture, otherwise to become the property of grantor.

Plaintiff alleges that thereafter on or about January 24th 1927 by deed recorded in vol. 707 p 24 of the Deed Records of Harris County, Texas, said Harry K. Johnson conveyed said easement and right of way to the defendant Houston North Shore Railway Company, and it was likewise provided in said deed that the said defendant, its successors and assigns, were to have and

hold the same as an easement or right of way for the construction and operation of an interurban railroad upon the following conditions, viz: that the right of way and occupancy of said land should be forfeited in the event of failure at any time to operate thereon an interurban railroad for a period of 30 successive days, exclusive of such time as operations might be prevented by conditions over which grantee had no control. It was provided in said deed that operation as an interurban railroad, as therein contemplated, must include a passenger schedule with first class coaches operated by electricity or gas engines, passing over the entire right of way therein or thereafter granted by said Johnson or his successors in interest to defendant Houston North Shore Railway Company; said coaches to be operated on a regular schedule of at least one train not less than every two hours of each day from 6:00 o'clock A. M. until 12:00 o'clock midnight, and it was further therein provided that, in the event of forfeiture of the right of way, all buildings erected thereon should become the property of the said Johnson without the necessity for an accounting therefor, and as liquidated damages; with the privilege in said defendant railway company of removing all rails and attachments, all overhead construction and electrical equipment, provided such removal was accomplished within 90 days from the date of forfeiture, or the same should likewise become the property of said Johnson as liquidated damages. It was further in said conveyance provided that the parties thereto were aware of the tendency of the courts to construe declarations of forfeiture as conditions rather than forfeiture provisions, and it was declared that it was intended in said conveyance of the easement therein provided for that a forfeiture was intended in the event

the conditions above stated were violated by the said grantee, defendant.

Plaintiff alleges that prior to the date of said deed from said Johnson to defendant Houston North Shore Railway Company, said defendant was well aware of the conditions under which the said right of way above described was conveyed and contracted to be conveyed to said Johnson, but plaintiff alleges that, as a matter of fact, on account of the aforesaid prior conveyance by the said W. C. Tyrrell Trust to said Johnson, the said Johnson has no interest of forfeiture under said deed, the same having been reserved ahead of him in favor of the W. C. Tyrrell Trust in the said contract of 1925 hereto attached and in its conveyance to Johnson hereinabove set forth.

V.

Plaintiff alleges that thereafter by deed dated January 24th 1927 and recorded in vol. 655 p 555 of the Deed Records of Harris County, Texas, the said Harry K. Johnson conveyed to defendant Houston North Shore Railway Company over, along and through the following described property, an easement and right of way 100 feet wide, except through the town of Highlands, Texas, where it is 60 feet wide, as follows:

> "Starting at a point nine hundred sixty (960) feet South of the Southwest corner of the intersection of the Crosby-Lynchburg Road and the Wallisville Road; said point is on the West line of the Crosby-Lynchburg Road and is the point of beginning, and is the center line of the sixty (60) foot right-of-way herein conveyed;
>
> "Thence South 80° 4' West forty nine hundred fifty two and two tenths (4952.2) feet to the point of a 3° curve;

"Thence to the left around the curve Four hundred sixty seven and eight-tenths (467.8) feet to the West line of the Town of Highlands. The right-of-way herein conveyed excludes the following sixty (60) foot streets, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th, and contains six and sixty three hundredths (6.63) acres, located in the town of Highlands;

"Thence continuing the 3° curve twelve hundred sixty seven and twenty five hundredths (1267.25) feet to point of tangent;

"Thence South 28° 1' West fifty nine hundred twelve and five tenths (5912.5) feet to the West bank of San Jacinto River. This strip or parcel of land is one hundred (100) feet wide by seventy one hundred seventy nine and seventy five hundredths (7179.75) feet long, and contains sixteen and forty-seven (16.47) acres, located in the Henry White Survey, Harris County, Texas."

Plaintiff alleges that said latter described property was a part of the property described in said agreement between the W. C. Tyrrell Trust and Harry K. Johnson hereto attached, and being out of and a part of said 1100 acres described in said contract in the Jessie White and Henry White Surveys, which the said W. C. Tyrrell Trust agreed by said contract to convey and did convey to said Johnson as a part of the consideration of said contract covering the construction of said interurban railroad. Plaintiff alleges that the right of way described in said last named conveyance from Johnson to the Houston North Shore Railway Company coming out of said Henry White and/or Jessie White Surveys was likewise, under the terms of said contract of 1925 between Harry K. Johnson and W. C. Tyrrell Trust above described, subject to the forfeiture provisions in said

contract of 1925, the said deed to Johnson for the 1100 acres in said White Surveys having been made by virtue of and in consideration of said contract of 1925, and so that the right of way to the Houston North Shore Railway Company across said surveys was likewise subject to the forfeiture terms of said contract between Johnson and the said W. C. Tyrrell Trust.

VI.

Plaintiff alleges that defendant Houston North Shore Railway Company, prior to the completed construction of said interurban railway between Houston, Baytown and Goose Creek, acquired all interest in the same, including the right of way easements in question, from said Johnson and the defendant is now the owner of said interurban railway, but that the defendant, Beaumont, Sour Lake & Western Railway Company and/or said Trustees are operating the same under a long time or permanent lease between the said defendant railway companies, with the terms and nature of which this plaintiff is not familiar and therefore cannot allege, same being peculiarly within their knowledge.

Plaintiff says that the defendant Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway Company at all times prior to and at the time of acquiring the interest of said Johnson in said easements and rights of way by the conveyances above mentioned, had complete and full knowledge of the terms of the contract between the said Johnson and the said W. C. Tyrrell Trust of 1925, with full notice and knowledge of all its terms, the said contract having been shown to and furnished by said Johnson to the executive officers of both defendant railway companies.

VII.

Plaintiff alleges that under the terms of said contract hereto attached, an interurban railway was constructed by the defendants and said Johnson between Houston, Texas, and Baytown and Goose Creek, Texas, as was therein provided should be done, and the defendant railway companies, at or about the time of the completion of said interurban railroad, began the operation of electric cars on hourly service between Houston and Goose Creek and Baytown, and so operated the same for several years. The construction and interpretation of the contract hereto attached between the defendants and this plaintiff was that the line of railway was to be operated, as in fact it was, built and operated between Houston and Goose Creek, via Baytown; the said railway having been so constructed and put in operation as aforesaid; and that the clause in said contract, "must be run over the entire line on a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight," meant and was intended to mean that at least one train would be operated over the entire line between Houston and Goose Creek not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight, and that such was the meaning of the words "entire line" as used in the contract. While plaintiff alleges said expression "entire line" is clear and unambiguous and means the entire line of railway constructed across plaintiff's property from the termini of the railroad, nevertheless plaintiff says, alternatively, that if such expression is in any way ambiguous as used in the contract, such was its meaning, intent and purport, not only at the time of the execution of said con-

tract but by subsequent construction and interpretation of the same by the defendants in so operating their trains under it.

That the language in the said conveyance from the W. C. Tyrrell Trust to Harry K. Johnson of date October 5th 1925, "Passing over the entire right of way herein or hereafter granted by me or my successor in interest to the said Harry K. Johnson" meant and was intended to mean over the entire right of way between the termini of Houston and Goose Creek, if such language is in any manner ambiguous, as plaintiff says it is not, but says, alternatively, if same is ambiguous, that such was intended to be and was at all times interpreted by the parties hereto to be its meaning, purport and effect.

VIII.

Plaintiff says that at or about December 1931 the defendant railway companies stopped and have since ceased the operation of electric passenger coaches or coaches operated by gas engines into the City of Houston, and has since operated said cars just outside of the corporate limits of the City of Houston, or within a few feet inside the corporate limits, and so that first class coaches operated by electricity or gas engines were and are not running over its entire line as constructed into the City of Houston but the continuity of operation was and has since been discontinued, causing passengers to have to transfer from electric interurban cars at or near the corporate limits several miles from the business district of Houston, and take separate and different transportation into Houston on buses maintained by defendants from the corporate limits to the business section. Plaintiff alleges that said conduct on the part

of the defendants was and is a violation of said existing contracts and agreements between the said Harry K. Johnson and the said W. C. Tyrrell Trust, in that such operation does not include passing over the entire right of way as in said contract and deeds set forth. Plaintiff alleges that the result of making passengers thus change their mode of transportation and transfer from one conveyance to another is to make the electric interurban transportation provided for in said contract wholly unattractive for passengers and destroys the desirability, usefulness and convenience of said service, so that the same is worthless and practically unused by the public.

Plaintiff, moreover, alleges that at or about the month of February, 1933, the defendant railway companies wholly stopped and they and defendant trustees, their agents and servants, have since said time ceased maintaining any passenger service by electric interurban or by gas engines passing over the entire line of railway and over the rights of way herein described on a regular schedule of at least one train not less than every two hours of each day from six o'clock A. M. to twelve o'clock midnight and have continued for much more than 30 days a failure to maintain any service from six o'clock A. M. to 9:30 A. M. or maintain any service from 1:30 P. M. to 5:30 P. M. or to maintain any service between 9:30 P. M. to 12:00 midnight over the entire line or over the rights of way herein described, as in said contracts provided for, and plaintiff says that defendants and/or said Trustees are not now maintaining service over the entire line or over the rights of way herein described on a regular schedule of at least one train passing over the right of way herein described or over the entire line not less than every two hours of each day from 6:00 A. M. to twelve o'clock midnight and have not

done so for more than 30 days prior to the filing of this suit.

Plaintiff says that by reason thereof the defendants and each of them under the terms of said contract and under said deeds have forfeited to this plaintiff, as successor to the W. C. Tyrrell Trust, all of said rights of way and easements thereover hereinbefore described acquired by the defendant Houston North Shore Railway Company through said Harry K. Johnson from the said W. C. Tyrrell Trust.

Plaintiff alleges that defendant railway companies and said defendant Trustees, their agents and servants, are each and both now, by reason of the facts aforesaid, trespassers upon said property and rights of way above described, and this plaintiff has elected and does hereby elect to declare a forfeiture of said easements and of said rights of way, and has elected to declare and does hereby declare that the said Houston North Shore Railway Company and said defendant Trustees their agents and servants, and defendant Johnson have no further title thereto or rights or privileges therein by the terms of said contract and by its said deeds and this plaintiff says that the said deed from W. C. Tyrrell Trust to Johnson of date October 25, 1925, and said Johnson's deeds covering any of the rights of way acquired by him from W. C. Tyrrell Trust to Houston North Shore Railway Company should be delivered up and be cancelled and held for naught.

IX.

Plaintiff further alleges, as aforesaid, that the defendant railway companies, at all times prior to acquiring the interest of said Harry K. Johnson in the construction and operation of said interurban railway,

had notice and knowledge of the terms and conditions, as in the contract hereto attached set forth, upon which the said Harry K. Johnson acquired by purchase several thousand acres of land from the said W. C. Tyrrell Trust, and that the conditions upon which said lands was so sold to Johnson and the rights of way aforesaid so granted to him were upon the distinct consideration that an interurban railway would be constructed and that a passenger schedule of first class coaches operated by electric or gas engines must be run over the entire line, on a regular schedule, of at least one train not less than every two hours of each day from 6:00 o'clock A. M. until 12:00 o'clock midnight. Plaintiff says that the defendant Houston North Shore Railway Company acquired the said Johnson's rights in the construction and operation of said interurban railway over this plaintiff's lands above described as the successor to said Johnson and, as a matter of law, burdened with his obligations, and, in consideration of so acquiring the same from said Johnson, undertook and assumed to construct and operate said railroad as in said contract provided for with respect to schedules for passenger service. Plaintiff alleges that defendant Houston North Shore Railway Company having assumed said construction and said operation as the successor to Johnson, the said defendant railway companies did for several years carry out and perform the schedule and passenger interurban service as in said contract provided for. Plaintiff says, however, that at or about the times aforesaid defendant railway companies ceased to maintain the passenger service as in said contract provided for and said defendants and said Trustees, their agents and servants, breached the said contract and have continued to breach the same in the manner hereinabove set forth, and so

that the operation of said interurban railway has become practically useless to this plaintiff as the successor in right and interest and title of the properties of the W. C. Tyrrell Trust.

As the successor in ownership of the lands and properties and rights under said contract of the said W. C. Tyrrell Trust, plaintiff now owns a large amount of land in the vicinity of Highlands, Texas, where the right of way hereinabove described is located. That said manner of service above described, in its failure as aforesaid to carry out said contract and agreement between the said W. C. Tyrrell Trust and the said Harry K. Johnson, has resulted in great damage to this plaintiff in this, viz: that it acquired the said properties and rights from the said W. C. Tyrrell Trust upon the faith of the carrying out of said contract by the defendant railway companies with respect to passenger service, and plaintiff says that failure to continue said interurban passenger service as in said contract provided for, and the violation of said agreement in the respects hereinbefore alleged, has resulted in great damage to this plaintiff in the depreciation of the value and use of its lands in said vicinity of Highlands, Texas. Plaintiff alleges that the failure to maintain said passenger service and the curtailment and limitation of the same, which plaintiff alleges to be permanent, has resulted in great depreciation of the market value of its properties by reason of making the same less accessible and convenient for transportation and by reason of the limitation of the use of said interurban railway for prospective purchasers of its property. That the decreased market value of its properties, so acquired by it, from and as the successor of the said W. C. Tyrrell Trust amounts to $150,000.00, in which amount it has been damaged

by reason of the failure to carry out said passenger service as in said contract provided for.

X.

Plaintiff further alleges that, as in said contract provided, said W. C. Tyrrell Trust conveyed to the said Harry K. Johnson the following described property, to-wit:

All land owned by it in the Jesse White and Henry White Surveys lying West of the Crosby-Lynchburg shell road in Harris County, Texas, being about eleven hundred (1100) acres, excepting one hundred (100) acres out of the Jesse White Survey adjacent to said road, as a bonus to said Johnson for the construction and operation of said railroad after the same had been completed and was in operation for thirty days. Said 1000 acres of land was one of the distinct considerations moving from the said W. C. Tyrrell Trust for the execution of said contract, and while the said contract provided, that the title in same to defendant Johnson should not be subject to the terms of forfeiture as in said contract provided with respect to the rights of way, nevertheless said land was so conveyed to defendant Johnson as a part of the consideration to him for the construction and operation of said interurban railroad. Said contract recited that the operation of said interurban would materially add to the value of the lands of the said W. C. Tyrrell Trust and further recited that the consideration advanced by the said Trust was essential to the successful operation of the same, and further defined the term "operation", as used in said contract, as meaning "a passenger schedule over which first class coaches, operated by electricity or gas engines must be run over the entire line on a regular schedule of at least one train

not less than every two hours of each day from six o'clock A. M. until twelve o'clock midnight."

XI.

Plaintiff says that the consideration upon which it, W. C. Tyrrell Trust conveyed to said Johnson said 1000 acres of land, viz., not only the construction but the operation of said railroad, as in said contract defined, has therefore failed on account of failure on the part of defendants to operate said interurban in the manner provided therein and in operating the same on the limited schedule hereinbefore alleged. That one of the considerations moving from the W. C. Tyrrell Trust was said land in the Jesse White and Henry White Surveys which land was of the reasonable value when conveyed to said Johnson of $20,000.00. That the aforesaid failure to operate said interurban according to the schedule provided in said contract has resulted in a failure of the consideration to the great injury of this plaintiff and whereby it would be inequitable and unjust for defendant Johnson to retain the full fruits of said conveyance of said land in said White Surveys. That the whole consideration to be received on the part of the said Trust was the passenger schedule and since the same is not being carried out and the defendants announce their unwillingness to carry the same out further than is being done, as hereinbefore alleged, and to plaintiff's injury, plaintiff says that said Johnson ought in equity and in good conscience be required to make good such failure of consideration according to the principles and laws of equity. That since the defendants Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway did, as aforesaid, take their respective interests in said railway with full notice of all the terms of said

contract between said Johnson and W. C. Tyrrell Trust, and since it is impossible for said Johnson to carry out said schedule, the said defendant railroads and their said Trustees are likewise legally liable to plaintiff, to the same extent as said Johnson, on account of the said schedule being wholly within their control. Plaintiff says said railway defendants and their said Trustees have thus made the performance of said schedule by said Johnson wholly impossible.

XII.

Plaintiff alleges that an equitable diminution from the value of said lands in the White Surveys on account of said failure of consideration would be not less than one half of the market value of the same at the time they were so conveyed to Johnson as aforesaid, and that plaintiff is entitled to recover from defendants the further sum of $10,000.00 as and for said partial failure of consideration in so conveying to said Johnson said lands.

WHEREFORE, premises considered, plaintiff prays for citation against defendants and said Trustee defendants, F. W. Baldwin and Guy A. Thompson, and that upon a final trial hereof, the said deed of the said W. C. Tyrrell Trust of date October 5, 1925, to defendant Harry K. Johnson, recorded in vol. 689 p 465 of the Deed Records of Harris County, Texas, be delivered up, cancelled, annulled and held for naught, and that the said deed from Harry K. Johnson to the defendant Houston North Shore Railway Company dated January 24, 1927, recorded in vol. 707 p 24 of the Deed Records of Harris County, Texas, be likewise cancelled, annulled and held for naught as an existing cloud upon plaintiff's title to the lands and properties therein conveyed, and that the

deed of defendant Harry K. Johnson to Houston North Shore Railway Company dated January 24, 1927, and recorded in vol. 655 p 555 of the Deed Records of Harris County, Texas, be cancelled, annulled and held for naught, in so far as it conveys or purports to convey to the Houston North Shore Railway Company any lands, easements or rights of way in the Jessie White and Henry White Surveys in Harris County, Texas.

Plaintiff further prays that upon final trial the defendants and the defendants said Trustees and each of them be perpetually enjoined and restrained from making further use of the lands therein described and be perpetually enjoined from using the same for right of way purposes for the operation of an interurban railway or for any other purpose whatsoever, and especially from using the same for the operation of trains, cars, or coaches thereon and for use in any manner as a railway or interurban railway right of way.

Plaintiff further prays for the recovery from the defendant Houston North Shore Railway Company and from the said defendant Trustees in their said capacity as Trustees, of its said damages in the sum of $150,000.00 and from the said Houston North Shore Railway Company and Beaumont Sour Lake & Western Railway Company and from defendant Johnson said sum of $10,000.00, and costs of suit, and for such other and further relief, special or general, legal or equitable as against all the defendants including said Trustees as it may be properly entitled to receive, and that said judgment be certified to the District Court of the United States of the Eastern Division, Eastern Judicial District of Missouri for observance.

.....

Attorneys for Plaintiff.

STATE OF TEXAS,
COUNTY OF HARRIS.

.....being duly sworn says that he is agent of the plaintiff herein and that the allegations above set out are true and correct.

.....

Subscribed and sworn to before me this the.....day of October, A. D. 1933.

.....

Notary Public in and for
Harris County, Texas.

EXHIBIT "A"

STATE OF TEXAS,
COUNTY OF JEFFERSON.

1. Memorandum of Agreement by and between the W. C. Tyrrell Trust, a joint stock association created by an agreement and Declaration of Trust bearing date the 31st day of December 1919, and appearing of record in the Deed Records of Jefferson County, Texas, Volume 190 page 597, reference to which is made, acting herein by and through H. C. Tyrrell, the duly appointed and qualified Trustee of said Trust, hereinafter referred to as First Party and Harry K. Johnson of Harris County, Texas, hereinafter referred to as Second Party:

WITNESSETH:

2. WHEREAS, First Party is the owner of approximately Sixteen Thousand (16,000) acres of land located about Sixteen (16) miles East of Houston in Harris County, Texas, known as Elene Fruit & Cotton Farms; and

Whereas Second Party is desirous of constructing an Interurban Railroad to and through the property of First Party to Baytown in Harris County, Texas, and First Party recognizes that the construction and operation of the proposed Interurban Railroad in a first class condition will materially add to the value of First Party's said lands; and

3. Whereas, second party is convinced that the assistance of First Party to said Interurban Railroad project, to the extent indicated by the agreement of First Party hereinafter set out, is essential to the successful construction and operation of said Interurban Railroad;

4. Now, THEREFORE, it is agreed as follows, to-wit:

First Party will convey to Second Party a sixty (60) foot right-of-way for the proposed Interurban railroad over and across the lands of First Party, second party to have the privilege of designating the route of said right-of-way through the lands of First Party with the following qualifications, viz., that said line shall in no event cross the Crosby-Lynchburg Road further South than the location of the South line of lot 12 of Unit "C" of the Elena Fruit and Cotton Farms as shown by the map thereof, copy of which is attached hereto, signed by First and Second Parties for identification.

5. The location of the right-of-way of said Interurban Railroad after crossing the said Crosby-Lynchburg Road, shall be determined by agreement of the parties hereto and in the event of their failure to reach an agreement thereon, location of the line shall be determined by arbitration in the usual manner, i.e., each Party hereto to select an arbitrator and those two, a third. The decision of the arbitrators to be in all respects binding upon the Parties to this agreement as to the location of the portion of the line last above referred to; the conveyance to be in the form of an easement, subject to forfeiture for non-user for the purpose of an Interurban Railroad, a definition of a non-user being a failure to operate as an Interurban Railroad, for a period of thirty (30) successive days, exclusive of such time as operations may be prevented by conditions over which Second Party has no control. Operation as an Interurban railroad must include a passenger schedule over which first class coaches, operated by electricity or gas engines, must be run over the entire line on a regular schedule of at least one train not less than every two hours of each day from six (6) o'clock A. M. until Twelve (12) o'clock midnight.

6. Regular service on said Railroad must begin not later than the 1st of July, 1926, but to the extend Second Party is delayed in construction by strikes, litigation or other conditions over which he has no control, time shall be added to the above limit.

7. The requirement that trains propelled by electricity or gas engines on said Interurban Railroad, is not intended to prevent the use of trains propelled by steam in the event of an emergency or in addition to the electric or gas trains.

8. In event of forfeiture of right-of-way, and other lands as herein provided for, all buildings erected thereon shall become the property of First Party, without the necessity for an accounting therefor, and as liquidated damages.

9. In the event of forfeiture of right-of-way Second Party is granted the privilege of removing all rails and attachments, all over head construction and electric equipment; such removal must be accomplished within 90 days from date of forfeiture or the same shall likewise become the property of First Party as liquidated damages.

10. First Party agrees to convey to Second Party, in fee simple the tract of land hereinafter described, said land being located in Harris County, Texas, and described as follows:

> All land owned by First Party in the Jesse White and Henry White Surveys, lying West of the Crosby & Lynchburg shell road, being about 1100 acres, excepting one hundred acres out of the Jesse White Survey adjacent to said road.

11. When Second Party shall have satisfied First Party that he is prepared and able to carry out the terms of this agreement, First Party will execute the necessary conveyance to the above land, the same to be placed in escrow in the American National Bank of Beaumont, with a copy of this agreement, for delivery to Second Party, upon completion of said Railroad and the operation thereof for 30 days. The conveyance of such tract of land is intended as a bonus by First Party to Second Party for the construction and operation of said Railroad for the time indicated and said land is not to be subject to forfeiture.

12. As a further consideration moving from First Party to Second Party for the construction and operation of said Railroad, First Party agrees that he will execute a conveyance to Second Party, covering the following described tracts of land in said Farms, to-wit:

As shown on the map of said Farms hereinabove referred to and as indicated on "Land Price Schedule" herewith, said land containing approximately 5097.8 acres, to be paid for by Second Party as per schedule attached hereto and designated "Land Price Schedule", the whole consideration therefor to be represented by Second Party's vendor's lien promissory notes dated the date of the conveyance and payable at Beaumont, Texas, or Houston, Texas, as follows:

13. Sixty-three thousand, six hundred forty nine dollars and 06/100 ($69,649.06) on or before the first day of July 1927.

Sixty-three thousand, six-hundred forty-nine Dollars & 06/100 ($63,649.06) on or before the 1st day of July, 1928.

Sixty-three thousand, six hundred forty nine Dollars

& 07/100 $63,649.07) on or before the 1st day of July, 1929.

Sixty-three thousand, six hundred forty nine Dollars & 07/100 ($63,649.07) on or before the 1st day of July, 1930, each of said notes bearing interest at the rate of 6 per cent per annum after July 1st, 1926, payable semi-annually on the 1st day of January & July each year thereafter providing that failure to pay any one note or interest thereon when due shall at the election of the owner or holder, mature all, providing for 10% additional as attorney's fees if not paid when due and placed in the hands of an attorney for collection and reciting the vendor's lien; said notes to be further secured by a Deed of Trust executed by Second Party covering said property and providing that failure to pay said notes principal or interest, when due, shall mature all of the same at the election of the owner thereof and authorizing a foreclosure thereunder, the same to be in the usual so called "long form" requiring vendee to pay one-half (½) of all taxes accruing for the year 1926 and other charges and assessments which might be levied against said lands by lawful authority during the time after July 1st, 1926, said Deed with said Deed of Trust and said vendor's lien notes to be placed in the American National Bank of Beaumont and said deed of trust and notes to be delivered to First Party when said deed is delivered to Second Party; said deed shall be delivered to Second Party on submission to First Party of satisfactory evidence of the expenditures by Second Party of the sum of $50,000.00 in the actual construction of an Interurban Railway as herein provided for, and shall provide for the release by First Party of the vendor's lien upon lands described therein in accordance with the "Land Price Schedule" attached hereto of even date

herewith and signed by the Parties hereto for identification.

14. The Deed reserving the vendor's lien and the Deed of Trust securing the above described notes shall contain a clause providing that Second Party may re-convey subject to the conditions hereinafter stated to First Party, at any time on or after July 1st, 1926, all lands remaining unsold out of the 5097.8 acres described in paragraph 12, in liquidation of the then unpaid notes given by Second Party to First Party therefor, and the First Party agrees to return to the Second Party all the unpaid notes of Second Party then outstanding and given for said land and cancel the Deed of Trust securing the same, both Parties being relieved of any further liability under said conveyance and Deed of Trust. However this reconveyance of said lands and the cancellation of said Deed of Trust and the surrender of said notes will have no effect whatever upon previous sales of land, the donation of the tract of land hereinbefore referred to, the right-of-way granted under this contract nor in any way affect or release the Second Party from any of the other obligations assumed hereunder. As a condition precedent to reconveyance by Second Party to First Party in liquidation of Second Party's said notes, Second Party is required to account to First Party for all sales of lands out of said 5097.8 acres in manner and form set out in paragraph 16 hereof.

15. It is understood that the sale of each tract or fractional part thereof sold by the Second Party after construction work has begun is to be treated as a separate and distinct transaction and on payment to the First Party of the amount per acre as provided for in the "Land Price Schedule", all the remaining cash, notes,

or other evidences of debt, involved in the purchase or sale of said tract or parcel of land becomes the property of the Second Party and are to be delivered to him for his benefit.

16. Second Party agrees that in the sale of any portion of said 5097.8 acres of land whether the same be by Deed or contract, to report all such transactions to First Party daily, and will daily deposit for collection and disposition as hereinafter provided with the Houston National Bank of Houston, Texas, all purchasers' vendor's lien notes with proper transfer of the vendor's lien to First Party and obligations for payment, together with cash payments received on such sales. All such deposits shall be held by said Bank and the money collected thereon paid to First Party on the first and fifteenth of each month, for the account of Second Party until the said 5097.8 acres of land has been fully paid for and released by First Party as provided "release clause" in conveyance by First to Second Party of said 5097.8 acres or until the said 5097.8 acres, or the remnant thereof, are reconveyed to First Party as provided in Paragraph Fourteen (14) and all money so received shall be credited on the then next maturing note of Second Party hereunder. All payments contracted to be made by vendees of Second Party affecting said 5097.8 acres of land or any part thereof, shall be contracted by vendees to be paid at Houston, or Beaumont, Texas. In the event Second Party reconveys said land or any portion thereof to First Party, in accordance with paragraph fourteen (14), then said Bank is authorized and hereby instructed to deliver to First Party all collections then in its hands on sales made by Second Party in pursuance hereof, as well as to deliver to First Party all notes or securities, Deed of Trust, transfers of vendor's lien,

abstracts, insurance policies or other valuable papers incident to or connected with sales made by Second Party from said 5097.8 acre tract which notes etc. may remain in said bank after Second Party has elected to so reconvey.

17. First Party agrees that he will release the vendor's lien on any portion of said 5097.8 acres of land when same have been fully paid by Second Party or by Second Party's respective vendees thereof, such payments to be in accordance with the "Land Price Schedule" above provided for and all such payments to be credited on the then next maturing note of Second Party.

18. Second Party agrees that his heirs or assigns will not, prior to the beginning of active construction by the Second Party hereinabove provided, for give general publicity to this agreement. Second Party acknowledging that such publicity would constitute a cloud upon First Party title to the lands described and in the event of Second Party's failure to consummate the said railroad construction, might interfere with the marketing of said lands. Should the project for any reason be delayed or abandoned, Second Party agrees to give written notice to First Party so as to cause as little inconvenience as possible.

19. It is mutually agreed that pending the beginning of construction of said railroad, as hereinafter provided, that First Party has the privilege of selling any portion of said 5097.8 acres of land but in the event any of such land is sold by First Party, First Party agrees to credit to account of Second Party, 11½% of the selling price of such lands, said credits to be allowed in cash covering one-half of each payment as made after forty per cent of the purchase price has been paid. Each sale to be a

separate transaction and all credits to Second Party to be cancelled in case of his failure to carry out his part of this contract.

20. The Second Party agrees to begin construction work on said Railroad within 60 days from the signing of this agreement, or forfeit his rights under this contract and option, and further that if and when construction shall begin that the right-of-way shall be located through the property of the First Party east of the Crosby-Lynchburg Road within 90 days from the signing of this agreement, and that work done and material furnished in connection with said construction will amount to not less than $10,000.00 within said 90 days and that fifty thousand dollars in work and material will have been furnished within four months of the signing of this contract. Failure to comply with either condition within the time limit specified will forfeit the rights of Second Party under this contract. It is understood that in the purchase of rails, electric equipment, and cars, the contract usually provides for a cash payment or bank guarantee when the contract is accepted, and that this advance payment or bank guarantee will be considered as material furnished the First Party that said cash payment has been made or guarantee given, and further that failure to do said work or furnish satisfactory evidence of cash payment or bank guarantee on request of First Party will be sufficient grounds for the cancellation of the rights of Second Party under this contract. It is understood, however, that the Second Party may extend the time for 60 days in which work is to be done or material furnished by delivering to First Party a bond, approved by First Party, for the sum of $10,000.00, payable to First Party as liquidated damages in case of failure to carry out the provisions of this con-

tract or Second Party may in lieu thereof deposit $10,000.00 in escrow in a bank or Trust Company approved by First Party to be paid First Party as liquidated damages in case of failure of second party to comply with his obligations herein by him undertaken or to be returned to the Second Party when $50,000.00 of work and material has been done or furnished within said four months plus the extension of sixty days. In event Second Party forfeits his rights under this contract by failure to begin construction within the time in this paragraph provided, his liability shall be the penalty of the bond in this paragraph provided for. Provided, however, that Second Party shall not thereby be relieved from full settlement with First Party for all lands conveyed by First Party to Second Party as herein otherwise provided for.

21. It is agreed and understood that to secure a satisfactory entrance and terminal facilities in the City of Houston, the owners of said Railroad may operate its cars over the tracks of some steam railway and in the City of Houston over the tracks of the Houston Electric Company.

33. It is understood that it may be necessary to rearrange the sub-division of the tract of land described in paragraph 12, in which case the Second Party will have a survey made and recorded to facilitate describing of land when sold.

23. References in this contract to liquidated damages accruing in favor of First Party are to be interpreted as cumulative to the end that a liquidated damage claimed by First Party in one of the instances provided shall not prevent him from setting up a claim for liquidated damages in any other contingency in his contract provided.

24. In the event of disagreement as to the interpretation of this contract, where not otherwise provided all matters in controversy shall be left to arbitration as provided above.

25. The rights of the Parties under this contract, it is agreed, are assignable by either party hereto.

In witness whereof the parties hereto have signed their names this ..... day of ..... 1925.

.....

First Party.

.....

Second Party.

FILE COPY

JAN 2 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

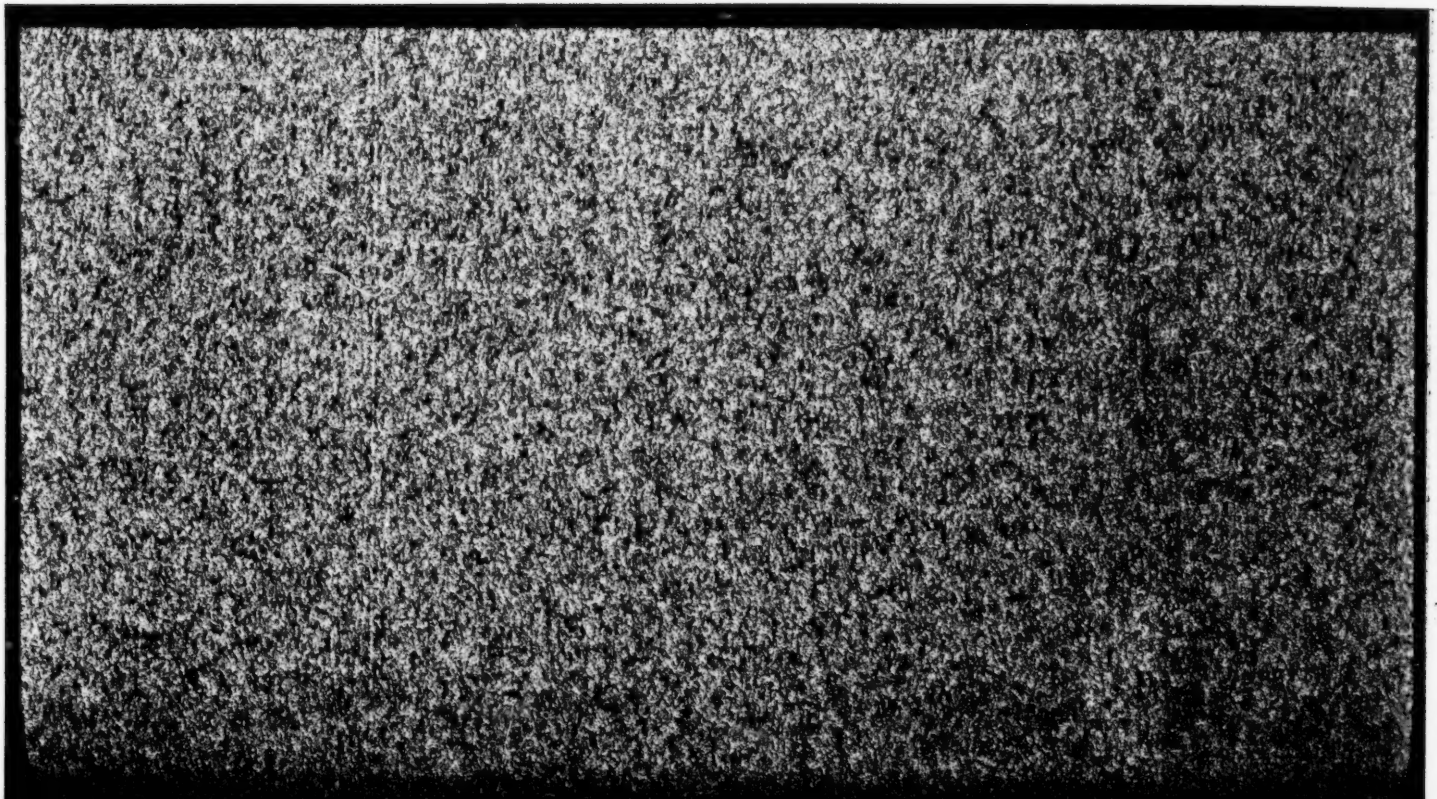
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE
L. W. BALDWIN AND GUY A. THOMPSON,
TRUSTEES, ET AL., *Petitioners*

RETURN TO RULE TO SHOW CAUSE



IN THE

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EX PARTE

L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., *Petitioners*

RETURN TO RULE TO SHOW CAUSE

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now come The District Court of the United States for the Southern District of Texas, and Thomas M. Kennerly, United States District Judge for the said Southern District of Texas, and make and file the following return to the rule to show cause issued out of this Court in this cause on the 11th day of December, A. D. 1933:

1. They admit that the facts, as distinguished from the legal conclusions, stated in the petition for mandamus, heretofore filed in this cause, are true.

The application to the United States District Court for the Southern District of Texas for certiorari, for removal of the cause from the State Court to the United States District Court, was presented to and considered by the Court upon (a) Applicants' Petition for Removal

and Certiorari, and the Amendment and Supplement thereto, and (b) the Answer thereto by and in behalf of plaintiff in the State Court, containing copies of plaintiff's amended petition in the State Court and of the order of dismissal of so much of the same as sought an injunction in the State Court.

The said Petition for Removal and Certiorari, the Amendment and Supplement thereto and the Answer thereto, are correctly copied as exhibits to the petition for mandamus filed in this Court.

2. The decision of November 20, 1933, evidenced by the order of that date (Petition for Mandamus, pp.12-13), was made in deference to the decision, on November 15, 1933, of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Ruff v. Gay*, No. 7,008 on the docket of that Court.

3. They will abide the decision of this Court in the premises, having no interest in the controversy beyond the duty of judicial decision.

Respectfully submitted,

THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS,

THOMAS M. KENNERLY,
Judge Presiding.

ATTEST: (SEAL)

L. C. MASTERSON,
Clerk, United States District Court,
Southern District of Texas.

THOMAS M. KENNERLY,
United States District Judge,
Southern District of Texas.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS

EDWARD J. WHITE,
FRANK ANDREWS,
ROBERT H. KELLEY,
Attorneys for Petitioners.

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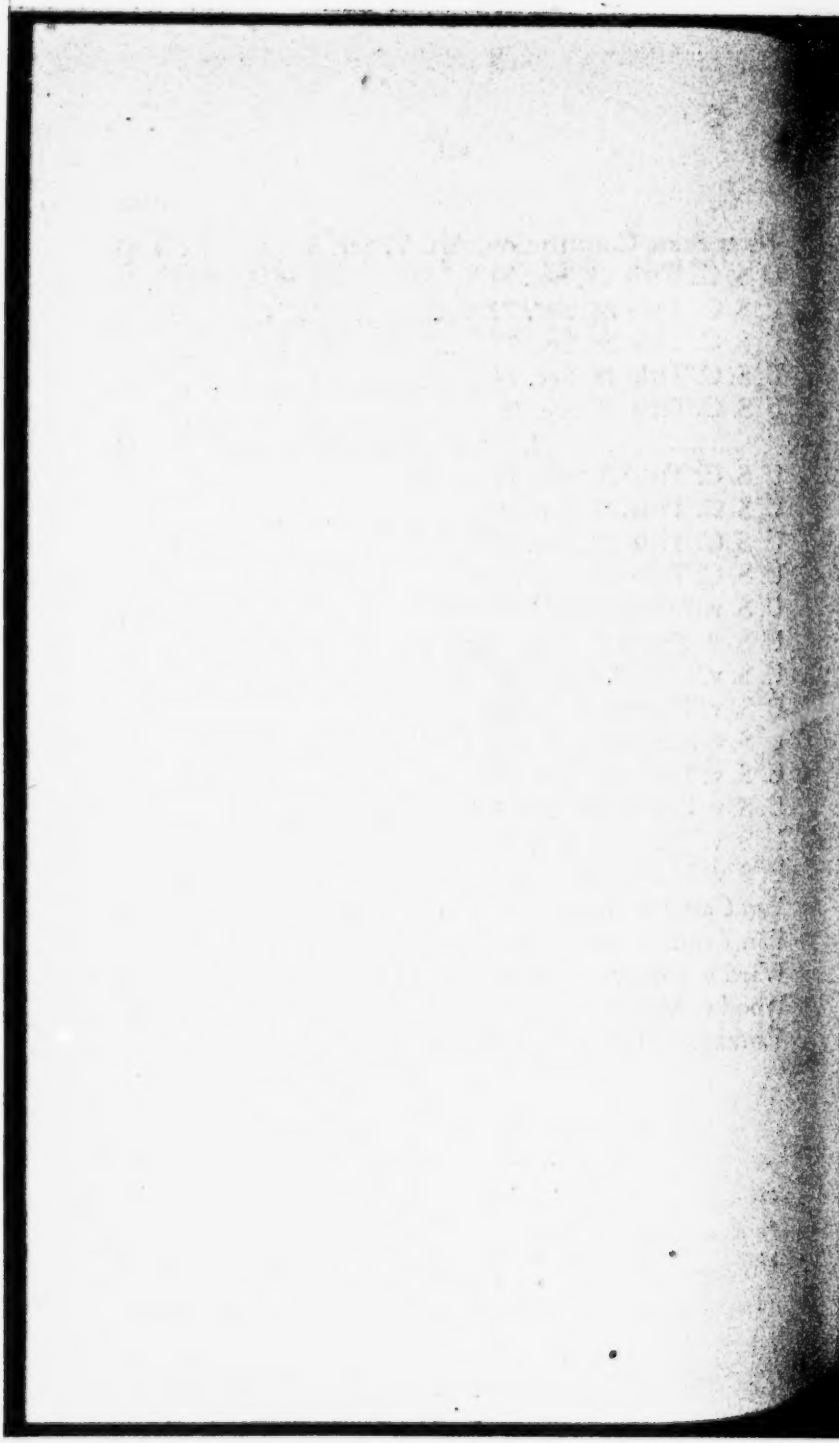

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. ....., ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS

Preliminary Statement.

Tyrrell & Garth Investment Company, a joint stock association, by its first amended original petition filed in the District Court of Harris County, Sixty-First Judicial District of Texas, sues petitioners and another person, praying for the cancellation, as clouds upon its title, of certain right of way deeds for alleged breach of condition subsequent, for injunction to restrain petitioners from occupying or using the right of way described in the deeds, and for the recovery of large damages (Petn. for Mand., p. 63).

Petitioners, claiming to be officers of a Federal court,

and desiring to remove the suit into the United States District Court at Houston, Texas, which was then in session, presented to it their petition for removal and certiorari under Section 76 of Title 28, U. S. C. (Petn. for Mand., p. 16). The plaintiff in the suit, by its attorneys, opposed the removal and at the same time presented a so-called reply to the petition (Petn. for Mand., p. 57). To meet certain objections contained in this reply, petitioners also presented a supplemental and amended petition for removal (Petn. for Mand., p. 26). The matter was taken under advisement by the District Judge, Honorable Thomas M. Kennerly, on October 19, 1933 (Petn. for Mand., p. 12).

On November 20, 1933, on the authority of *Ruff v. Gay*, which had been decided by the Circuit Court of Appeals for the Fifth Circuit on November 15, the District Court denied the petition for removal and certiorari and returned the papers to counsel for petitioners (Petn. for Mand., P. 13).

Petitioners now pray (Petn. for Mand., p. 13) that this Court issue its writ of mandamus to compel the District Court to take jurisdiction of said suit, on removal.

POINT I.

ON THE FACE OF THE STATUTE THE SUIT IS REMOVABLE

On the question of removability the pertinent portions of the statute are as follows:

> "When any civil suit * * * is commenced in any court of a state * * * against any officer of the courts of the United States, for or on account of any act done under color of his office or in the performance of his duties as such officer * * * the said suit * * * may, at any time before the trial or final hearing thereof, be removed for trial, into the district court * * * in the district where the same is pending." Sec. 76, Title 28, U. S. C.

1—The Suit is a Civil Suit:

The amended petition filed in the State court (Petn. for Mand., p. 63) shows that the suit is a civil suit for injunction, damages, cancellation and removal of cloud. It has no aspect of a criminal prosecution. Article 504 of the Texas Code of Criminal Procedure reads:

> "The primary pleading in a criminal action on the part of the State is the indictment or information."

On the other hand, Article 1971 of the Revised Civil Statutes of Texas of 1925 reads:

> "Civil suits in the District and County Courts shall be commenced by a petition filed in the office of the Clerk."

2—The Suit was Commenced in a Court of a State:

The District Courts in Texas are courts of general

jurisdiction, provided for by Section 8 of Article 5 of the State Constitution, which, in part, declares:

> "The District Court shall have original jurisdiction * * * of all suits for trial of title to land, * * * of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest * * * and said Court and the judges thereof shall have power to issue writs of * * * injunction * * * and all writs necessary to enforce their jurisdiction."

In the so-called reply to the petition for removal, it was admitted (Petn. for Mand., p. 59) that the suit was filed and pending in the District Court of Harris County, Texas.

3—The Suit in the State Court is—

(a) against Officers of a Court of the United States;

(b) on Account of Acts Done under Color of their Office and in the Performance of their Duties as such Officers:

(a) The character of petitioners as officers of a Federal Court is alleged in plaintiff's amended petition in the State Court, was averred in detail in original and amended petitions for removal, and is again alleged in the petition for mandamus (Petn. for Mand., pp. 63, 18-22, 46, 50, 4-8). Petitioners Baldwin and Thompson are trustees in bankruptcy, appointed (Petn. for Mand., pp. 46, 50) under Section 77 of the Bankruptcy Act, as amended by the Act of March 3, 1933 (Public No. 420,

72d Congress), having powers and duties similar to those of a receiver in equity.

In *Isaacs v. Hobbs Tie and Timber Company*, 282 U. S. 734, this Court referred to trustees in bankruptcy as being "the Court's officers." Receivers appointed by a Federal equity court were held to be officers of the Court in *Barnette v. Bank*, 270 U. S. 438; *Newell v. Byram*, 26 Fed. (2d) 200 (C. C. A. 8), and *Ruff v. Gay*, unreported (C. C. A. 5).

(b) It appears from plaintiff's amended petition (Petn. for Mand., p. 63) that the claim asserted in the State court is:

That plaintiff's predecessor in title conveyed to petitioners' predecessor in title a right of way across its lands for a proposed interurban railroad upon condition that a passenger schedule be maintained "over the entire line on a regular schedule of at least one train not less than every two hours of each day from six o'clock a. m. until twelve o'clock midnight;" that petitioners, in the operation of the railroad subsequently constructed on this right of way, acting under the orders of the United States District Court at St. Louis (Petn. for Mand., pp. 46, 50, 32) breached this condition by failing to operate trains over the entire line; and since February, 1933, "the defendant railway companies wholly stopped, and they and defendant trustees, their agents and servants, have since said time ceased maintaining any passenger service * * * passing over the entire line of railway and over the rights of way herein described on a regular schedule of at least one train not less than every two hours of each day from six o'clock a. m. to twelve o'clock midnight; and have continued * * * a failure to maintain any service from six o'clock a. m. to nine-thirty a. m. or * * *

from one-thirty p. m. to five-thirty p. m. or * * * between nine-thirty p. m. to twelve midnight over the entire line or over the rights of way herein described" (Petn. for Mand., p. 76).

The corporate petitioners, having been directed by the bankruptcy court (Petn. for Mand., pp. 32 and 42) to run, manage and operate their railroads and property without trustee from May 2, 1933, until June 30, 1933, and the trustee petitioners, having been likewise authorized (Petn. for Mand., pp. 46, 50) with respect to the period on and after July 1, 1933, their arrangements of train schedules and train operations are clearly acts "done under color of their office" and "in the performance of their duties as such officers."

4—There has Been No Trial or Final Hearing in the State Court:

This was alleged in the petition for removal, was not denied, and is again alleged in the petition for mandamus (Petn. for Mand., pp. 18, 10).

5—The District Court For the Southern District of Texas, Houston Division, is "The District Court * * * in the District Where Same is Pending:"

The Houston Division of the Southern District of Texas includes the County of Harris (Section 189, Title 28, U. S. C.).

6—The Joinder of Harry K. Johnson as Co-Defendant Does not Preclude Removal:

In many cases decided prior to the 1916 amendment (39 Stat. 532), by which the benefits of Section 76, Title 28, U. S. C., were extended to officers of Federal

courts, it was held that the right of removal enjoyed under that and similar statutes was not affected by the joinder, as co-defendants, of other parties to whom the benefits of the statute did not extend. Among such decisions we cite: *Fisk v. Union Pacific R. Co.* (1869), 9 Fed. Cases No. 4827; *Fisher v. Daudistal* (1881), 9 Fed. 145; *Gallatin v. Sherman* (1896), 77 Fed. 337; *Ward v. Congress Construction Company* (1900), 99 Fed. 598. See also *Matter of Dunn*, 212 U. S. 374. As shown below (p. 42) the amendment of 1916 should be construed in the light of prior judicial interpretation of the law amended.

7—On the Face of the Statute, Therefore, The Suit is Removable to the District Court to Which the Petition For Removal Was Presented:

All of the statutory requirements are present. The suit is a civil suit; commenced in a court of a State; against officers of a court of the United States, for and on account of acts done under color of their office and in the performance of their duties as such officers; and, before the trial and final hearing thereof, a proper petition for removal was presented to the District Court in the district where the same is pending.

POINT II.

THE PROCEDURE ADOPTED FOR REMOVAL WAS IN CONFORMITY WITH THE STATUTE

The pertinent provisions of Section 76, Title 28, U. S. C., are:

> "* * * The said suit * * * may * * * be removed * * * upon the petition of such defendant (any officer of the courts of the United States) to said district court and in the following manner: Said petition shall set forth the nature of the suit * * * and be verified by affidavit and, together with a certificate signed by an attorney or counsellor at law of some court of record * * * of the United States, stating that as counsel for the petitioner he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court * * *. When the suit is commenced in the State Court by * * * petition * * * the clerk of the district court shall issue a writ of certiorari to the State Court requiring it to send to the district court the record and the proceedings in the cause * * *, upon delivery of such process * * * shall be held to be removed to the district court * * *"

1—The Petition for Removal and Certiorari Set Forth the Nature of the Suit:

See petition for mandamus (pp. 16 and 26, 63).

2—It was Verified by Affidavit and Certified by Counsel as Provided in the Statute:

See petition for mandamus (pp. 24, 25).

3—The United States District Court Being in Session, the Petition was Presented to the Court:

The court was in session (Section 189, Title 28, U. S. C.; Petn. for Mand., p. 10). That the petition was presented to the Court is disclosed by the order of November 20, 1933 (Petn. for Mand., p. 12).

4—Instead of Entering the Order of Removal, Evidently Contemplated by the Statute, and Directing the Issuance of the Writ of Certiorari to the State Court, as by Statute Required, the Court, on the Authority of the Decision of the Circuit Court of Appeals for the Fifth Circuit in Ruff v. Gay, Denied the Relief Prayed for and Returned to Counsel for Petitioners the Papers Submitted, With its Order of Refusal Endorsed Thereon:

See petition for mandamus (pp. 12-13). Petitioners, of course, had no control over the action taken by the Court after they presented their petition for removal and the amendment thereto; but as far as they could control the proceedings, they complied with the requirements of the statute.

POINT III.

ON THE QUESTION OF REMOVABILITY THE STATUTE SHOULD BE CONSTRUED AS IT READS, AND AS INTERPRETED BY THIS COURT (BARNETTE V. WELLS FARGO NAT'L BANK, 270 U. S. 438) AND BY THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT (NEVELL V. BYRAM, 26 FED. (2d) 200); AND SHOULD NOT BE CONSTRUED AS IT WAS BY THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT (RUFF V. GAY, NO. 7008, DECIDED NOVEMBER 15, 1933).

1—There is a Conflict of Decisions:

In *Barnette v. Bank*, 270 U. S. 438, Mr. Justice Stone, speaking for this Court, said:

> "But an examination of the bill, which is set forth in the record, shows that the purpose of the suit was to recover land and funds then in charge of the receiver of a court in Alaska which was created by laws of Congress, and derived its powers and authority from those laws. *Such a suit was removable* under Section 28 of the Judicial Code (Comp. St. 1010), as supplemented by the amendment of Section 33 by the Act of August 23, 1916, c. 399, 39 Stat. 532 (Comp. St. Sec. 1015). Matarazzo v. Hustis (D. C.), 256 F. 882, 887-889; see Texas & Pacific Ry. Co. v. Cox, 12 S. Ct. 905, 145 U. S. 593, 603, 36 L. Ed. 829; Board of Commissioners v. Peirce (C. C.) 90 F. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska with reference to land located in Alaska, *in all of which the receivers were acting in virtue of authority conferred on them as officers of the Alaska court.* Rouse v. Hornsby, 16 S. Ct. 610, 161 U. S. 588, 590, 40 L. Ed. 817." (Italics ours.)

In *Newell v. Byram*, 26 Fed. (2d) 200, Judge Sanborn, for the Circuit Court of Appeals for the Eighth Circuit said:

> "Receivers appointed by a court of the United States are officers of that court within the meaning of this statute" * * *
>
> "On November 27, 1926, the receivers presented their petition to the United States District Court below for the issuance of its writ of certiorari to the State Court, for a removal of this suit from that court to the United States court under and pursuant to Title 28, Sec. 76, U. S. C., above quoted. In their petition they alleged the commencement of the plaintiff's action against them as receivers, their appointment as receivers of the railroad by the court below, their possession and operation thereof under its orders at the time of the alleged injuries, and they attached to their petition and made a part of it the complaint of the plaintiff. The court below on November 27, 1926, issued the writ of certiorari and removed the case to the Federal court. On December 10, 1926, the plaintiff made a motion to remand the case to the State Court, and filed an answer to the petition for the writ of certiorari, in which she alleged that it appeared from her complaint, and the fact was, that her cause of action 'is based upon common law negligence of said defendants, and each of them.'" * * *
>
> "The removability of actions of this character under Section 33 of the Judicial Code has been generally sustained in the courts of the United States, since the decision of the cases of Matarazzo v. Hustis (1919 D. C.) 256 F. 882, 887; Barnette v. Wells Fargo Nat. Bank, 270 U. S. 438, 441, 46 S. Ct. 326, 70 L. Ed. 669, and Berens, Jr., v. Byram, et al., Receivers, 26 F. (2nd) 953, opinion of Hon. Jas. D. Elliott, United States District Judge, South Da-

kota, filed May 27, 1927. There have been many other decisions of the United States District Courts to the same effect, which have not been printed or published."

But in *Ruff v. Gay* (Nov. 15, 1933, unreported), the Circuit Court of Appeals for the Fifth Circuit, through Judge Hutcheson, relying upon "the settled policy" of Congress and upon certain congressional proceedings and reports, rather than upon the plain language of the statute, sustained the contention of the appellant that *"the invoked section applies only to actions and proceedings brought personally against the receiver; that is, to hold him responsible in his own person or property."* To sustain this conclusion, the Court stated that for fifty years the policy of Congress, particularly in regard to actions against receivers, had been "to restrict, not to enlarge, federal jurisdiction." It also said:

> "To us it seems bizarre and fanciful to say that by an amendment of three lines, tucked away in a section of the Code relating entirely to the removal of suits and prosecutions against revenue officers, and officers of the Congress, a section having no relation whatever to receivers nor even generally to removals, it was intended to make a secret breach in the removal laws. * * * we are left in no doubt that 'the mischief and defect' for which the statute, before its amendment, did not provide, was not the failure of the statute to authorize receivers to remove actions, 'against the corporation in their name' into the Federal court; it was the failure of the statute to extend to officers of the United States courts the privilege of removal which before only revenue officers, and persons acting for them, and for the Congress, had enjoyed. Maryland *v.* Soper, 270 U. S. 9; Smith v. U. S. 58 Fed. (2d) 735;

Davis v. S. Carolina, 107 U. S. 597. Had the Congress been intending to remove the mischief which the trial court thought the amendment aimed at, that receivers could not remove into Federal courts suits 'against the corporation by name in the hands of or in the possession of the receiver,' McNulta v. Lockridge, *supra*. Had that been 'the true reason of the remedy' no statute more unsuited to afford the remedy because more unrelated to the mischief could have been chosen for amendment, unless indeed the Congress had the intention to make an unsuspected breach in the removal laws, by hiding that breach away in a secret place.

"But we are not left to construction to determine what its real intention was. Introduced first in the House on April 6, 1916, as H. R. 14299, the amendment was immediately referred to the House Committee on the Judiciary. On May 27 it was reported back without amendment, accompanied by H. R. 776, Vol. 3. In the light of this report the construction the trial court put on this statute, unreal enough without it, appears yet more unreal. It declared that 'outside of typographical corrections, the bill is a recital of the old law, with only one change' by which the words 'or against any officer of the courts of the United States for or on account of any act done under color of his office, or in the performance of his duties as such officer' are intended to be inserted. 'The purpose of the amendment' says the Report, is 'to extend the provisions of Sec. 33 uniformly to officers of the courts of the United States not only in cases arising under the revenue laws, but in all cases, giving to them the same protection in all cases now given to officers acting under the revenue laws and to officers of the Congress. The omission of such provision from the original Act gives rise to certain incongruities and creates a want of uniformity in the provisions of the law.' The statute, with the proposed amend-

ment, does not extend in any degree the jurisdiction or the powers of the courts of the United States. It merely provides a more orderly method of procedure which inures as much, in fact more, to the benefit of the States than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal, so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for a trial before a court and jury. * * * It will be observed therefore, that the effect of the proposed amendment does not increase or enlarge the jurisdiction of the Federal Courts, and is confined solely to giving to the officers of the Federal Courts, in case of prosecution in their official capacity, a regular and orderly right of removal from the State to the Federal Court, instead of compelling such officers to resort to the present remedy by writ of habeas corpus, which would require the officers to go into custody in order to obtain the writ.'

"Without discussion or amendment in either House or Senate, the bill as thus reported was passed. * * * '"

It then undertook (we think unsuccessfully—see *infra*, pp. 76-79) to distinguish the decision of this Court in *Barnette v. Bank*, 270 U. S. 438, saying:

"Aside from the fact that the holding of the majority opinion, that in the absence of a showing in the record as to the real ground of the removal, it might be assumed that the suit was properly removed under Sec. 33 as amended, was, because of the absence of such showing, a purely supposititious one, and therefore not binding as a precedent, it can not be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver

personally, or 'against the corporation in his name'."

The opinion concludes with the statement that—

"The section invoked by the receiver is without application to this suit; the remand was improperly denied, the suit improperly dismissed."

The judgment of the District Court was thereupon reversed with directions to set aside the dismissal and remand the cause to the State court.

There is, therefore, a clear conflict of decision, on the application of the statute and on the removability of the suit, between the Circuit Court of Appeals for the Fifth Circuit, on one hand, and this Court and the Circuit Court of Appeals for the Eighth Circuit, on the other hand; and with the latter the decision in *Snider v. Sand Springs Ry. Co.*, 62 Fed. (2d) 635, seems to place the Circuit Court of Appeals for the Tenth Circuit.

And the conflict of opinion arises on this question: Should a statute, plain and clear upon its face, be construed according to the natural import of its terms, or should extraneous matter be searched out and resorted to in order that an ambiguity which is not apparent should be first created and then resolved contrary to the language of the statute?

2—Where a Statute is Plain on its Face, there is no Room for Construction:

The statute declares—

"When *any* civil suit * * * is commenced in *any* Court of a State * * * against *any* officer of the Courts of the United States for or on account of

> *any* act done under color of his office or in the performance of his duties as such officer * * * *the said suit* * * * may * * * be removed for trial into the district court * * * " (Italics ours.)

In *Barnette v. Bank*, 270 U. S. 438, Mr. Justice Stone, for this Court, held that a suit to recover land in the custody of a receiver of a Federal court "was removable under" the section quoted from above. He evidently read the statute, and the other members of the Court evidently read the statute, in the light of its natural import. So did the Circuit Court of Appeals for the Eighth Circuit in *Newell v. Byram*, 26 Fed. (2d) 200; and so did the Circuit Court of Appeals for the Tenth Circuit in *Snider v. Sand Springs Ry. Co.*, 62 Fed. (2d) 635. But in *Ruff v. Gay* the Court of Appeals for the Fifth Circuit holds that the section "applies only to actions and proceedings brought personally against the receiver; that is, to hold him responsible in his own person or property." With due respect to that Court, the decision seems utterly untenable.

In *United States v. Shreveport Grain & E. Company*, 287 U. S. 77, the United States appealed from an order of the District Court quashing an indictment which charged misbranding of packages of food by labeling each as containing a greater quantity than it in fact contained. The following rule of statutory construction was stated:

> "Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H. R. 850, 62d Cong. 2d Sess., pp. 2-4), agreed with the view that the authority to make rules and regulations was confined to the

establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S. R. 1216, 62d Cong. 3d Sess., pp. 2-4), reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, *but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms.*. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 588, 589, 66 L. Ed. 371, 383, 384, 22 A. L. R. 1086, 42 S. Ct. 232; Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, 199, 57 L. Ed. 1446, 1452, 33 S. Ct. 893, Ann. Cas. 1915A, 315; George Van Camp & Sons Co. v. American Can Co., 278 U. S. 245, 253, 73 L. Ed. 311, 313, 60 A. L. R. 1060, 49 S. Ct. 112. Like other extrinsic aids to construction *their use is 'to solve, but not to create, an ambiguity.'* Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. Ed. 219, 222, 20 S. Ct. 155. Or, as stated in United States v. Hartwell, 6 Wall. 385, 396, 18 L. Ed. 830, 832, *'If the language be clear it is conclusive. There can be no construction where there is nothing to construe.'* The same rule is recognized by the English courts. In Rex v. Navigation Comrs., 5 Ad. & El. 804, 816, 111 Eng. Reprint, 1370, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was 'never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense.' See also United States v. Lexington Mill & Elevator Co., 232 U. S. 399, 409, 58 L. Ed. 658, 661, L. R. A. 1915B, 774, 34 S. Ct. 337; Caminetti v. United States, 242 U. S. 470, 485, 61

L. Ed. 442, 452, L. R. A. 1917F, 502, 37 S. Ct. 192, Ann. Cas. 1917B, 1168."

This is one of the most recent decisions of this Court. While clearly framed, it only serves to reaffirm a line of decisions almost as long as the history of this Court.

United States v. Fisher, 2 Cranch 358, decided in 1804, opinion by Chief Justice Marshall, involved the question whether the United States as the holder of a protested bill of exchange which had been negotiated in the ordinary course of trade, was entitled to a preference over general creditors where the debtor had become bankrupt. The decision depended upon the proper construction of the fifth section of the Act of March 3, 1797, which in part read:

> "Any revenue officer or other person hereafter becoming indebted to the United States by bond or otherwise * * * "

It was contended that this section related only to those debtors who had received public money. The Court found that the title of the Act and the first four sections thereof plainly related to receivers of public money. The defendant pointed to "the michiefs to result from the construction upon which the United States insists." The Court held that if the meaning of the legislature was plain it must be obeyed, even though great inconvenience might result; that "where the intent is plain, nothing is left to construction;" that "the natural sense of words is not to be disregarded, because that which they import might have been better or more directly expressed;" that where political regulations are made which might be inconvenient, "it would be going a great way that a constrained interpretation

must be put upon them to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed." The Court held that the statute meant what it said, and that it embraced the debt involved in the suit.

Merritt v. Welsh, 104 U. S. 694, was a suit to recover back duties exacted by the collector of the Port of New York on certain sugar which had been imported. Under the statute, the duties were based upon the Dutch standard of color. The collector contended that while the Dutch standard was named in the statute, that, nevertheless the intent of the law was to adopt it as a standard of quality, and that where modes of manufacture changed and it ceased to be such a test, the reason of the rule ought to prevail and quality ought to still be the test. The Court said that the reasoning would be very good if the law prescribing the standard was not explicit in its terms, that whatever was in the minds of the legislature, the intent must be sought from the words they had used, and that if they were clear the Court need go no further.

Board of Lake County Commissioners v. Rollins, 130 U. S. 662, was a suit against Lake County, Colorado, on a large number of county warrants issued for ordinary county expenses. The county defended on the ground that the County Commissioners had no authority to issue the warrants in question under Section 6, Article II, of the Constitution of Colorado. The proper construction of this section of the Constitution was the only point involved. It provided in part that "the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption

of the Constitution, shall not at any time exceed twice the amount above herein limited." The trial court held that this section of the Constitution placed a limit on the power of the county to incur indebtedness by contract, but that it did not affect its liability for further amounts in the shape of fees and salaries. This Court said:

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.
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> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. Newall v. People, 7 N. Y. 97; Hills v. Chicago, 60 Ill. 86; Denn v. Reid, 35 U. S. 10 Pet. 524 (9:519); Leonard v. Wiseman, 31 Md. 204; People v. Potter, 47 N. Y. 375; Cooley Const. Lim., p. 57; Story Const.

Sec. 400; Beardstown v. Virginia, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently. no room is left for construction. United States v. Fisher, 6 U. S. 2 Cranch, 358, 399 (2:304, 317); Doggett v. Florida R. Co. 99 U. S. 72 (25:301)." (l. c. 1063.)

United States v. Ewing, 184 U. S. 140, was an appeal from a judgment of the Court of Claims awarding petitioner $1,264 in a readjustment of his salary as postmaster under a statute enacted in 1883. The pertinent part of the Act and the holding of the Court with respect thereto are stated in the following excerpt from its opinion:

"Having stated the circumstances in which a readjustment could be had, the act of 1883 proceeded to state from what period such readjustment should take effect, and it stated that it was 'to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made.' This language is plain and unambiguous, and the court is bound by its terms. The readjustment cannot take effect in the same term for which the sworn returns were reviewed. It is postponed to the beginning of the next quarter.

"It is said that as thus construed the statute leads in many cases to great injustice, and hence such construction should not be adopted. The difficulty is that any other construction violates the clear directions of the law, and although the result may be to withhold its benefits from some who might be regarded as otherwise entitled to it, yet we cannot for that reason alter its terms so as to in-

clude them, and thus ourselves enact instead of construing the law."

That was an Act whose plain terms *denied* certain rights to a Federal officer. This Court adhered to the language of the Act in applying it. Here, the plain terms of Section 76 *give* certain rights to Federal officers. *Its* language, also, should be adhered to.

Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184, was a suit by the coal company to recover damages from the railroad company because of rebates allowed to other shippers. The proper interpretation of Section 8 of the Act to Regulate Commerce was involved, and in support of its position plaintiff referred to a statement made by a member of the Senate Conference Committee when the bill was before Congress. The court held that "not even formal reports—much less the language of a member can be resorted to for the purpose of construing a statute contrary to its plain terms."

United States v. Lexington Mill and E. Co., 232 U. S. 399, was an action under Section 10 of the Food and Drugs Act to condemn certain flour as adulterated. It was also contended that the flour was adulterated and misbranded under Section 7 of that statute. The court said:

> "Applying these well known principles in considering this statute, we find that the fifth subdivision of Sec. 7 provides that food shall be deemed to be adulterated, 'if it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*' The instruction of the trial court permitted this statute

to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended, the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent".

United States v. First National Bank, 234 U. S. 245, opinion by Mr. Justice Day, was a suit by the United States to set aside certain conveyances of land in the White Earth Indian Reservation in Minnesota. In 1867, the reservation had been set aside to the Chippewa Indians, and provision had been made for the certification to each Indian of 160 acres of land with the proviso that the property could not be alienated except upon approval of the Secretary of the Interior. By statute enacted on February 8, 1887, an allotment of the land in severalty was authorized, together with the issuance of patents covering the same, with the further proviso that the lands were held by the United States in trust for the Indians for a period of twenty-five years. By the so-called "Clapp Amendment" adopted in 1906-7, the restrictions on alienation with respect to Indians of mixed blood were removed, but as to Indians of the full blood approval of the Secretary of the Interior was still required before such a sale could be made. The sales involved were made by Indians with a very small percentage of white blood. The Government contended that "mixed blood" meant those Indians of one-half white blood or more than one-half white blood. This court held that the term "mixed blood" would be given its usual

and ordinary meaning; that congressional committee reports showing the after effects of legislation could have little weight in determining their meaning, and certainly could not overcome the meaning of the plain words which had been used; that disastrous results flowing from the legislation when given its natural meaning could not influence the courts in administering the law; that "the responsibility for the justice or wisdom of legislation rests with the Congress, and *it is the province of the court to enforce, not to make, the laws;*" that "the policy of the government in passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may, as is the fact in this case, afford an unstable ground of statutory interpretation." It was further said:

> "The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the act the words necessary to make that intention clear; that is, we deem this a case for the application of the often expressed consideration, aiding interpretation, that if a given construction was intended, it would have been easy for the legislative body to have expressed it in apt terms."

Mackenzie v. Hare, 239 U. S. 299, opinion by Mr. Justice McKenna, was a mandamus proceeding to compel the election commissioners of San Francisco to register petitioner as a qualified voter. Petitioner had married an alien who lived in California and was making, and intended to make, California his permanent residence. A statute passed in 1907 provided "that *any* American woman who marries a foreigner shall take the nationality of her husband". The petitioner contended that the Act was not intended to deprive an American

woman, who married a foreigner and remained within the jurisdiction of the United States, of her citizenship. The Court said:

> "Does the act invite or permit such assistance? Its declaration is general, 'that any American woman who marries a foreigner shall take the nationality of her husband.' There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.
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> "Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or, rather, *all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words*, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others" (Italics ours).

Caminetti v. United States, 242 U. S. 470, was a prosecution under the White Slave Act of 1910. Caminetti was indicted for transporting a woman from Sacramento to Reno for the purpose of debauchery, it be-

ing shown that she became his mistress and concubine. He based his defense on the proposition that the Act of Congress was intended to reach only *commercialized* vice. The familiar rule, that the statute meant what it said, was followed; and the Court refused to alter or vary that meaning by referring to committee reports, the caption of the Act, or to what was said by members of Congress while the statute was under consideration. The statute there involved used the expression "any person"; that here involved uses the terms "any officer" and "any civil suit."

Railroad Commission v. C. B. & Q., 257 U. S. 563, cited with approval in *United States v. Louisiana*, 54 Sup. Ct. Rep. (Adv. Ops.) 28, 31, required an interpretation of Sec. 13 of the Interstate Commerce Act. It was contended that the statute was not intended to confer upon the Interstate Commerce Commission the power to remove every discrimination against interstate commerce, and in support of this view committee reports and explanatory statements of members of Congress were cited. This Court held that *"such aids are only admissible to solve doubt, and not to create it."*

Standard Fashion Company v. Magrane Houston Co., 258 U. S. 346, was a suit to restrain respondent from violating a certain contract for the sale of patterns. The contract contained an agreement that the respondent would not sell or permit to be sold on its premises any other patterns during the term of the contract. Respondent based its defense on Section 3 of the Clayton Act which prohibited any contract of sale containing an agreement that the purchaser should not deal in the goods of a competitor where the effect of the agreement was to substantially lessen competition. The

Court refused to consider committee reports in interpreting the Act, saying that its terms were plain and that it constituted a defense to the suit.

In *Mason v. United States*, 260 U. S. 545, the President had made an order withdrawing certain lands from settlement and re-entry. It was contended that the order did not embrace appropriations under the mining laws. The Court held that the meaning of the order was plain; that there was no room for construction; and it refused to apply certain rules of interpretation insisted upon by Mason and which might well have governed had ambiguities existed.

Russell Motor Car Company v. United States, 261 U. S. 514, involved a statute which empowered the President "to modify, suspend, cancel or requisition any existing or future contract for the building, production or purchase of ships or material." The Motor Car Company had made an agreement with the government to supply it with anti-aircraft guns at an agreed price. Pursuant to the statute, the contract was cancelled. The Motor Car Company sued, contending that the section of the statute above quoted related only to *private* contracts and did not authorize the government to cancel *its own* contracts. This Court held that the words "any existing or future contract" should be read with literal exactness; that they included *all* contracts, whether private or governmental; that rules of statutory construction have no place except in the domain of ambiguity; that the statute meant what it said; and that the President was authorized to cancel the contract. Here, again, there will be observed the strict analogy between the expression "*any* contract" and the

phrase "*any* civil suit against *any* officer" of the Federal courts.

Commissioner of Immigration v. Gottlieb, 265 U. S. 310, was a habeas corpus proceeding in which the trial court had directed the discharge of the wife and child of a Jewish rabbi who had been refused admission into the United States. The proper interpretation of an Act of Congress relating to such admissions, presented the only point discussed. The case is cited primarily as an indication of the extent to which the courts go in reading statutes literally, rather than because the facts make the case in point. The court held that the case was one of "peculiar and distressing hardship", but that the words of the statute left no room for construction; that the courts had no choice but to follow it without regard to consequences; that under the Act the respondents were not entitled to admission, and accordingly it reversed the decisions below.

Van Camp v. American Can Company, 278 U. S. 245, opinion by Mr. Justice Sutherland, involved the construction of Section 2 of the Clayton Act (Section 13, Title 15, U. S. C.). The Court said:

> "These facts bring the case within the terms of the statute, unless the words 'in any line of commerce' are to be given a narrower meaning than a literal reading of them conveys. The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied. The contention is that the words must be confined to the particular line of commerce in which the discriminator is engaged, and that they do not include a different

line of commerce in which purchasers from the discriminator are engaged in competition with one another. In support of this contention, we are asked to consider reports of congressional committees and other familiar aids to statutory construction. But the general rule that 'the province of construction lies wholly within the domain of ambiguity' (Hamilton v. Rathbone, 175 U. S. 414, 419, 421, 44 L. Ed. 219, 221, 222, 20 Sup. Ct. Rep. 155), is too firmly established by the numerous decisions of this court either to require or permit us to do so. The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include. Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity (United States v. Goldenberg, 168 U. S. 95, 103, 42 L. Ed. 394, 398, 18 Sup. Ct. Rep. 3), or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole (Ozawa v. United States, 260 U. S. 178, 194, 67 L. Ed. 199, 207, 43 Sup. Ct. Rep, 65). Nothing of this kind is to be found in the present case."

Here also it may safely be affirmed that "nothing of this kind is to be found in the present case."

United States v. Missouri P. R. Co., 278 U. S. 269, 277, involved the construction of paragraph (4) of Sec-

tion 15 of the Interstate Commerce Act (Section 15, Title 49, U. S. C.). Mr. Justice Butler, speaking for this Court, said:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. * * *
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> " * * * Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

As "it is for Congress to determine whether the Commission should have more authority," likewise it is for Congress to determine whether the United States District Courts shall have more authority, originally or on removal.

In *United States v. Felt and Tarrant Mfg. Co.*, 283 U. S. 269, respondent was allowed a recovery, by the Court of Claims, of income and excess profit taxes alleged to have been illegally exacted. The statute required the filing of a claim or demand as a prerequisite to suit. This Court reversed the judgment since no such claim was filed, saying that "it is not within the judicial province to read out of the statute the requirement of its words."

Old Colony Railroad Company v. Commissioner of Internal Revenue, 284 U. S. 552, was decided on certiorari to review a decision of the United States Board of Tax Appeals that certain bond premiums received by the taxpayer did not constitute taxable income. An interpretation of the phrase "all interest * * * on its indebtedness," contained in Section 234 of the Revenue Act of 1921, was necessary to the decision. The Court said:

> "In other words, the contention is that by the use of the quoted phrase the statute did not intend to allow the deduction of the amount agreed to be paid, which the contract denominates 'interest', but of a different sum to be ascertained by a calculation which will allocate the payment between a partial and ratable return of the premium and 'effective' interest on the par of the security.
>
> "Is this the reasonable construction of the language of the act; 'all interest * * * on its indebtedness'? The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification'. Levy's Lessee v. M'Cartee, 6 Pet, 102, 110, 8 L. Ed. 334. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' Maillard v.

Lawrence, 16 How. 251, 261, 14 L. Ed. 925. And see United States v. Buffalo Gas Co., 172 U. S. 339, 341, 19 S. Ct. 200, 43 L. Ed. 469; United States v. First Nat. Bank, 234 U. S. 245, 258, 34 S. Ct. 864, 58 L. Ed. 1298; Caminetti v. United States, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502 Ann. Cas. 1917B, 1168."

Lynch v. Allworth-Stevens Company, 267 U. S 364, was a suit to recover an alleged illegally exacted income tax. Whether or not the respondent was entitled to a depletion allowance under the provisions of an Act of Congress, was the only point presented. The Act permitted "a reasonable allowance for the exhaustion of property arising out of its use." Respondent was the *lessee* of certain ore bodies. The claim of the collector was that such an allowance could be granted only to the *owner* of the land. This Court held that there was nothing to suggest that the word "property" was used in any limited sense; and it said that *the "plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."*

We submit that the construction placed on Section 76 in the Fifth Circuit is not "the plain, obvious and rational meaning of the statute" but that it involves a "curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." For this reason, the interpretation of the statute in the Fifth Circuit stands opposed not only to the decision of this Court in *Barnette v. Bank*, 270 U. S. 438, but also to

the other decisions cited above. See also *Fidelity & Deposit Co. v. Arenz*, 54 Sup. Ct. Rep. (Adv. Ops.) 16.

3—The History of the Statute:

The opinion of the Circuit Court of Appeals in *Ruff v. Gay* briefly adverts to the history of the statute and to the congressional policy of the past fifty years and, partly on such grounds, undertakes to construe the statute contrary to the decisions of this and other courts, and contrary to the natural import of its terms.

The history of this statute is not compassed by the past fifty years; nor even by the past hundred years; and when that history is fully developed, it impels a conclusion very different from that reached in *Ruff v. Gay*.

The Judiciary Act of 1789 (1 Stat. 73) provided for removals from State courts into Federal courts in three instances only: (a) in suits against aliens; (b) in suits by a citizen of the State in which the suit was brought against a citizen of another State; and (c) in suits for land claimed under grants from different States. The procedure for removing these cases was substantially that which is now provided (Section 72, Title 28, U. S. C.) in ordinary cases of removal; namely the presentation to the State court of a petition for removal with security for costs.

Section 76, Title 28, U. S. C., appears to have had its genesis in the Act of February 4, 1815, which was plainly one enacted to further the successful prosecution of the War of 1812 (3 Stat. 195). This Act permitted the removal from State Courts to the Circuit Courts of the Union of suits and prosecutions against "any collector, naval officer, surveyor, inspector or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this Act, or under color

thereof, for anything done or omitted to be done as an officer of the customs, or for anything done by virtue of this Act or under color thereof."

The procedure for removal provided in this Act was substantially that required by the Judiciary Act of 1789, and by the present statute concerning ordinary removals (Section 72, Title 28, U. S. C.).

So solicitious was the Congress that the officers named in this Act might have the benefit of trial in the courts of the Union that it was further provided that even after final judgment in the State Court an appeal or writ of error could be sued out to the Circuit Court where the case would be tried anew, on the facts as well as the law.

This Act, by its terms, was doomed to expire at the termination of the war. It was substantially re-enacted, however, in the Act of March 3, 1815 (3 Stat. 231), which, being also a temporary measure, was extended by the Act of March 3, 1817 (3 Stat. 396), for an additional four years.

In November, 1832, an ordinance of nullification was adopted by the people of South Carolina in the Columbia convention. This ordinance was aimed at the revenue laws of the United States then in force. Shortly thereafter the Legislature of South Carolina enacted certain rigorous laws designed to enforce that ordinance. Among other weapons intended to defeat the enforcement of the revenue laws was a provision prohibiting appeals and writs of error to the Federal Courts under pain of criminal punishment, and forbidding the State courts from giving any copy of the record for that purpose.

In his message to the Congress of January 16, 1833 (III Messages and Papers of the Presidents, 1173),

President Jackson, after reviewing the ordinance of nullification and the statutes passed in aid thereof, declared:

> "If these measures cannot be defeated and overcome by the power conferred by the Constitution on the Federal Government, the Constitution must be considered as incompetent to its own defense, the supremacy of the laws is at an end and the rights and liberties of the citizens can no longer receive protection from the government of the Union. * * * The whole revenue system of the United States in South Carolina is obstructed and overthrown, and the government is absolutely prohibited from collecting any part of the public revenue within the limits of that state."

Referring to "those aggressions upon the authority of Congress which, by the ordinance are made part of the fundamental law of South Carolina" the President declared:

> "They offer to the United States no alternative but unconditional submission * * *.
>
> "In this posture of affairs the duty of the government seems to be plain. It inculcates a recognition of that State as a member of the Union and subject to its authority, a vindication of the just power of the Constitution, the preservation of the integrity of the Union, and the execution of the laws by all constitutional means."

Was there here evident any design to afford any personal protection to any officer of the Government except as that may have been incidental to the preservation of the Union and the exercise of its right to enforce its laws? The President in the same message later referred to the particular means by which the people of

South Carolina had undertaken to prevent the collection of the Federal revenues. He did not refer to the best means of giving personal protection to Federal officers, but instead he considered "the best means of avoiding or of preventing the apprehended obstruction to the collection of the revenue." His recommendation was:

> "It may therefore be desirable to revive, with some modifications better adapted to the occasion, the sixth section of the act of the 3d March, 1815 * * * and to provide that in any case where suit shall be brought against any individual in the courts of the State for any act done under the laws of the United States he should be authorized to remove the said cause by petition into the circuit court of the United States without any copy of the record, and that the court should proceed to hear and determine the same as if it had been originally instituted therein * * *
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> "*Provisions less than these*, consisting as they do for the most part rather of a revival of the policy of former acts called for by the existing emergency than of the introduction of any unusual or rigorous enactments, *would not cause the laws of the Union to be properly respected or enforced.* It is believed these would prove adequate. * * *"

The President stated that our fathers had—

> "bequeathed to us a government of laws and a Federal Union founded upon the great principle of popular representation. * * * *We are called to decide whether these laws possess any force and that Union the means of self-preservation*" (Italics ours).

Responsive to the recommendation contained in this message, the Congress passed and the President approved the Act of March 2, 1833 (4 Stat. 633), in which, for the first time, we find a provision for the removal of suits into the Federal court by Federal officers by presenting their petition for removal to the Federal court itself, without bond and without reference to the amount in controversy. This Act also provides that if the Circuit Court should be in session, the petition for removal should be presented to it; but if not in session, to the Clerk, who was to issue a writ of certiorari to bring up the record from the State court; and that upon the service of that writ on the clerk of the State court, the suit was to be regarded as removed into the Circuit Court "and any further proceedings, trial or judgment therein in the State court shall be wholly null and void."

In other words, the procedure there outlined was precisely that which today is provided in Section 76 of Title 28, U. S. C. The only substantial difference is that the class of federal officers entitled to the benefits of the law has, by subsequent Acts of Congress, been *enlarged*.

Here was no central thought of affording any personal protection to any individual. The Union had been challenged. South Carolina had flung the gauntlet in the face of Andrew Jackson. And Andrew Jackson and the Federal Congress, as was their right under the *code duello*, selected the weapons with which the contest should be conducted—a contest involving the liberty and the property of no one man and no one or more Federal officer, but the very life of the Union. If resort be had to history to ascertain the meaning of this statute and the intention of Congress, either in enacting it or later in adding to those entitled to its benefits other classes of Federal officers, the vivid picture thus disclosed is far

from that conceived by the Circuit Court of Appeals for the Fifth Circuit.

By the Act of March 3, 1863 (12 Stat. 755), the right of removal was also accorded to other Federal officers, particularly military officers, but the procedure for removal was similar to that provided in the Judiciary Act of 1789, inasmuch as no necessity existed for the procedure described in the Act of 1833. This also was a war measure and was primarily designed for the preservation of the Union rather than the liberty and property of Federal officers. The class of persons entitled to the benefit of this act was *enlarged* by Section 50 of the Act of June 30, 1864 (13 Stat. 244).

By the Act of July 27, 1868 (15 Stat. 226), the right of removal was also extended to corporations, other than banks, organized under the laws of the United States, upon the usual condition of filing petition and bond in the State court. It is interesting to note, as indicating whether the purpose of this Act was personal or governmental, that it was a supplement to the Act of February 21, 1863 (12 Stat. 657), entitled "An Act to Allow the *United States* to Prosecute Appeals and Writs of Error Without Giving Security."

The Act of February 28, 1871 (16 Stat. 433), amended the Act of May 31, 1870 (16 Stat. 140) which had been passed in aid of the Fifteenth Amendment and was commonly known as one of the Civil Rights statutes.

The Act of 1871 further enlarged the class of people entitled to invoke the right of removal from the State Courts to the Circuit Courts, and, evidently in view of the conditions existing throughout the South, provided for the removal in the manner described in the Act of 1833, and in the manner today provided in the statute under consideration in this case. This was an Act de-

signed to carry into effect and to enforce the provisions of the Fifteenth Amendment.

Without undertaking to trace the details of these removal provisions through the Revised Statutes and through the Act of March 3, 1875 (18 Stat. 401), by which officers of Congress were given the right of removal; the Judicial Code of March 3, 1911, and the Act of 1916 by which the right of removal was extended to officers of the courts of the United States, it seems sufficient to say that from the Act of 1815 down to the present time the conditions and circumstances leading up to the passage of the various statutes referred to indicate that the primary design and purpose of Congress was to strengthen the arm of the government; to require that governmental issues should be tried and decided in governmental courts, and not to provide any personal protection to the officers of the government except as the safety of the individual soldier has reference to the safety of the army.

The members of Congress who voted for the adoption of the Act of 1916 may well be assumed to have known the purpose of the enactment of the Act of 1833. In 1916 half of the world was ablaze with war, spies and secret agents of foreign governments were scattered throughout this country. Some of them had already been detected. Those who were found would probably be dealt with by the courts of the United States. This government was even then upon the very brink of war. Large sections of this country and very large sections of some States were known to be greatly averse to any action which would distress or discommode the Central Powers. In the event of war, new laws would be required, new remedies devised; enemies and enemy property must be handled, perchance through new of-

ficers and agencies of the National courts not then known by name.

It was gravely important that the officers of the courts of the Union, not for themselves but for the Union, should be strengthened and given every support which could be extended to them in anticipation of the impending conflict. However, officially, this government was neutral. It would have been highly impolitic for any member of Congress, in considering this Act, or the bill which gave it birth, to assert that such was its purpose and its aim. Considering the delicacy of the international situation then existing, it may well have been that the committee which reported this bill and recommended that it be passed did, in fact, entertain motives for favoring its adoption which were not expressed in the debates and were not bared in the official report of the committee. Whatever may have been the motives of the committee or its chairman, there is every reason to believe that the members of the House and Senate who voted for its passage were not blind to the possibilities of the situation; recognized its real effect, understood that by the decisions of this Court which we have cited, the courts would give effect to the simple and natural language of the Act; and on those grounds voted for it.

When Congress passed the Act of March 3, 1875, by which the right of removal by summary process was given to officers of Congress, and when it passed the Act of August 23, 1916, further extending the benefits of the Act to officers of the United States courts, there stood in the statutes of the United States several entirely separate sections relating to the removal of causes. Cases removed under one of these (Section 71, Title 28, U. S. C.) require the filing of a petition and bond with the State court. Another (Section 76, Title 28, U. S. C.)

provided the summary process by petition to the Federal court without security. Are we to understand that the careful selection in each instance of the particular section to be amended is to be given no weight? On either occasion Congress could have done what the Circuit Court of Appeals for the Fifth Circuit says it intended to do by amending the section which it chose *not* to amend. Furthermore, it *could*, if it had desired, have provided that the benefits of the statute should extend not to all officers of the Federal courts, but only to marshals and their deputies and possemen; it *could* have provided that not *every* civil suit against those officers might be removed but only those in which the action was brought against the officer to hold him responsible in his own person or property. The fact remains that Congress did *not* amend the ordinary removal statute in either case; it did *not* limit the officers of Federal courts to a select class indicated by title; it did *not* limit the kind of suits against those officers which it declared to be subject to removal by summary process.

We invoke the history of the law and assert that its careful review will demonstrate our challenge that the decision in *Ruff v. Gay* is untenable.

These were evidently the considerations which induced this Court to hold, as it did, in the case of *State of Colorado v. Symes*, 286 U. S. 510, opinion by Mr. Justice Butler. This was an original proceeding for mandamus in the Supreme Court to be directed to the Judge of a District Court in Colorado to compel the remand of a case to the State court. The case in question was a murder indictment against a prohibition agent of the United States. During the course of its opinion the Court thus explained the purpose of the involved section of the code:

"The protection afforded by section 33 extends to prohibition agents. 27 U. S. C. Sec. 45 (27 U. S. C. A. Sec. 45). *The various acts of Congress constituting the section as it now stands were enacted to maintain the supremacy of the laws of the United States* by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power. Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Maryland v. Soper (No. 1), 270 U. S. 9, 32, 46 S. Ct. 185, 70 L. Ed. 449; Nashville v. Cooper, 6 Wall. 247, 253, 18 L. Ed. 851; Findley v. Satterfield, Fed. Cas. No. 4,792. It scarcely need be said that *such measures are to be liberally construed to give full effect to the purposes for which they were enacted.*" (Italics ours.)

4—The Statute, as Amended in 1916, must be Interpreted in the Light of the Construction Previously Placed upon it by the Courts:

The Fifth Circuit Court of Appeals interprets the amendment of 1916 as authorizing removal of cases only in those instances where a personal judgment is sought against an officer of the court. This construction necessarily excludes all cases in which the purpose is to secure a judgment against the receiver or trustee as such. In aid of its interpretation, the court refers to the committee report accompanying the amendment in the House. It is true that this amendment makes it perfectly plain that suits against officers of the court, where the endeavor is to hold them personally liable by reason of their official acts, are removable. It can be readily shown by reference to the report, however, and to the history of the statute, that the amendment was intended

to relate not only to such personal suits, but to *all* suits and prosecutions against such officers.

The decision further states, or intimates, that the purpose of the amendment was to extend to officers of Federal courts the same protection which had previously been accorded to revenue officers. This is probably a fair statement of its purpose, and hence reference should be made to decisions of the courts in which the act with reference to revenue officers had been given practical application.

In considering these decisions, Section 842, Title 28, U. S. C., should be borne in mind. This section provides that when any recovery is had against an officer of the revenue for any act done by him, or for money exacted by him and paid into the treasury in performance of his official duty, and the court certifies that there was probable cause for his action, or that he acted under proper authority, no execution shall issue against the collector, but the amount so recovered shall be provided for and paid out of the proper appropriation, from the treasury. It has been held by this Court that suits against collectors of internal revenue are essentially personal in character. *Smietanka v. Indiana Steel Company*, 257 U. S. 1; *Sage v. United States*, 250 U. S. 33.

George Moore Ice Cream Company v. Rose, 289 U. S. 373, decided May 8, 1933, opinion of Mr. Justice Cardozo, apparently places this section of the statute in a different light. It is therein held that where the complaint shows upon its face that the tax had been duly assessed by the Commissioner of Internal Revenue, and that the collector was acting within the scope of his duties or under proper authority in making the collection, he is entitled *as a matter of right*, to a certificate

converting the suit against him to one against the Government; that in such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into the suit.

Turning now to the decisions dealing with revenue officers, attention is first directed to *Philadelphia v. Diehl,* 5 Wall. 720. Therein, plaintiff sued the defendant as a collector of internal revenue in an action of assumpsit, to recover back certain duties paid under protest. The suit was instituted in a State court and removed by certiorari into the Federal court under Section 3 of the Act of March 2, 1833. Speaking through Mr. Justice Clifford, this Court held that the clear implication of the Internal Revenue Act was that the judgment against a collector in such a case was in the nature of a recovery against the United States; yet the case was undeniably one which could be removed under the Act of 1833 as amended by the Act of 1866.

In *Tennessee v. Davis,* 100 U. S. 257, the defendant, a revenue officer, was indicted for murder in a State court in Tennessee. The cause was removed by certiorari into the Federal court. A motion was made to remand, and the judges being divided in opinion certified the questions to this Court. It was the contention of the State that the Act only embraced prosecutions in State courts *for offenses under the laws of the United States.* The Court condemned this construction, holding that the statute meant what it said, and that it authorized "the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer." In that case, therefore, the Court refused to

limit or narrow the application of the statute to less than the full area of its terms.

United States v. Lee, 106 U. S. 196, was an action of ejectment originally commenced in the Circuit Court for the County of Alexandria, Virginia. As soon as the declaration was filed, the case was removed into the Circuit Court by certiorari. The case was carried to the Supreme Court by writ of error. The property involved was sold at a tax sale by tax commissioners appointed under the Act of June 7, 1862, for the collection of taxes in insurrectionary districts. The exact status, or title, of the defendants Coffman and Strong is not entirely clear, but apparently they were tax commissioners who bought the land in for the United States. This is indicated by the following excerpts, the first from the opinion of the Court, and the second from the dissenting opinion of Mr. Justice Gray:

> "The title relied on by defendants was a tax sale certificate made by the commissioners appointed under the Act of Congress of June 7, 1862 (12 Stat. at L. 422), 'for the collection of direct taxes in the insurrectionary districts within the United States,' as amended by the Act of February 6, 1863 (12 Stat. at L. 640). At this sale, the land was bid in by said Commissioners for the United States, and a certificate of that fact was given by these commissioners and introduced on the trial as evidence by defendants."

> "These facts were made to appear at three stages of the case:

> "First. They were stated in a petition filed by Kaufman and Strong in the State court, for the removal of the case into the Circuit Court of the United States, under section 643 of the Revised

> Statutes, on the ground that the defendants were officers of the United States, and holding the land by title derived from officers of the United States, acting under a revenue law of the United States, the validity of which was affected. That petition was granted and the case removed accordingly."

At all events, the defendants were holding the property as officers of the United States and removed the case into the Federal court on the ground above stated. It was their position during the trial of the cause that they could not be divested of possession of the property because they held it as officers of the United States. The Court overruled this proposition, and in so doing made the following broad, clear statement which has a bearon our proposition:

> "If it be said, that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions, to hostile proceedings in the state courts, the answer is, that no case can arise in a state court, where the interests, the property, the rights or the authority of the Federal Government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal Government.
>
> "The slightest consideration of the nature, the character, the organization and the powers of these courts will dispel any fear of serious injury to the Government, at their hands."

The defendants in the *Lee* case claimed no personal interest in the Arlington estate. They stood to suffer no

personal loss, in person or property, if cast in the suit. Yet the case was recognized as one which they were clearly entitled to remove on account of their official interest and character.

Thus, in one of the most notable decisions ever handed down by this Court, the statute now involved was construed as we contend it should be.

Cleveland, etc., Railroad Company v. McClung, 119 U. S. 454, was a suit by the railroad company against McClung to recover freight charges on certain dutiable goods that had been transported by the railroad company and turned over to McClung or his deputy, as collector of customs at Cincinnati. Such procedure was authorized by an Act of Congress. On the goods in question, the freight charges were paid to McClung or his deputy, by the consignees, and the goods were delivered by him to the consignees. The charges were never paid to the company by McClung. The railroad company sued in the State court to recover these charges and by certiorari the case was removed into the Circuit Court. A motion to remand was filed and denied. Judgment was rendered for defendant and the railroad company appealed. On the removal question, the Court said:

> "The removal was under section 643 of the Revised Statutes, which provides, among other things, for the removal of 'a civil suit * * * commenced in any court of a State against an officer appointed under or acting by authority of any revenue law of the United States, * * * on account of any act done under color of his office.' This is a suit against a collector of customs, an officer appointed under the revenue laws of the United States, for an act alleged to have been done by him in the delivery of dutiable goods placed in his hands by virtue of his office

subject to a carrier's lien. His liability, if any there is, grows out of his official duty to keep the goods and deliver them to the consignees thereof when the import duties are paid and the carrier's lien discharged. The allegation is that the collector, instead of notifying the carrier, as the law required, delivered the goods to the consignees on receiving himself the moneys due for the carrier's charges. This suit is for the money so received. Clearly, then, according to the allegations of the petition, the suit is for an act done by the collector under color of his office. This is not seriously denied; but the claim is that—as the defendant insists, and the court below has decided, that it was not the official duty of the collector to collect the carrier's money and, therefore, that he is not liable for the acts of his deputy in that behalf—the suit is really one that could not be removed. But the petition alleges an act done by the collector under color of his office, and seeks a recovery on that account. Such a suit is removable; and certainly the right to a removal is not taken away because the collector says in his defense that the act charged was not in fact done. If done by him, it was done under color of his office. The thing to be tried is whether it was done."

In *Downes v. Bidwell,* 182 U. S. 244, an action was begun in the Federal court against the collector of the Port of New York to recover back duties which had been paid on goods imported from Porto Rico. The opinion, by Mr. Justice Brown, dealt primarily with whether the Island of Porto Rico, by the treaty of cession, became a part of the United States, but a jurisdictional question was raised and the Court referred to the involved section of the code, stating that it, together with the section of the statute giving Circuit Courts jurisdic-

tion over all suits arising under any act providing for revenue from imports or tonnage, "are evidently intended to include all actions against customs officers acting under color of their office."

Dennistoun v. Draper, 7 Fed. Cases 488, Case No. 3804, 5 Blatchf. 336, was an action of replevin originally brought in a State court of New York to recover the possession of certain cotton. The case was removed into the Federal court by certiorari under the Act of March 2, 1833. The defendant was an officer under the revenue laws of the United States, and alleged in his petition for removal that he held the property by virtue of his office. The opinion, handed down in 1866, dealt with a motion to remand. This motion raised certain fact questions. The court held that the proper procedure was to carry these questions along with the case and dispose of them when it was tried. During the course of the opinion, it was said:

> "I agree, that, if the petition and affidavit, with the certificate of counsel, failed to bring the cause within the act of congress providing for the removal, it would be the duty of the court, on motion, to remand it; and such order has also not unfrequently been entered in cases where it appeared clearly, by the admission of the parties or otherwise, that they were not within the act of removal. But, in cases where the proceedings are in conformity with the act, removal is imperative, both upon the state and the circuit court; and, if the facts are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter court. The question of jurisdiction belongs to the federal court, and must be heard and determined there. The statute is *peremptory*, that 'the cause shall thereupon be entered on the docket of said court,

and shall be thereafter proceeded in as a cause originally commenced in that court,' and 'shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial or judgment therein, in the state court, shall be wholly null and void' " (Italics ours).

Wood v. Matthews, 30 Fed. Cases 465, No. 17, 955, 2 Blatchf. 370, decided in 1852, was an action of trespass for taking and detaining a certain horse originally instituted against an internal revenue officer in a State court of Vermont. It was removed into a Federal court by writ of habeas corpus *cum causa* under the Act of March 2, 1833. The decision was on a motion to dismiss for lack of jurisdiction. The court held that since the proceedings in removing the cause appeared to be in all respects in conformity with the Act of Congress, the case was regularly in court, and the motion to dismiss was overruled.

In *Van Zandt v. Maxwell,* 28 Fed. Cases 1093, No. 16,884, 2 Blatchf. 421, plaintiff sued in a State Court in New York to recover part of the proceeds of merchandise which had been imported and condemned for a breach of the revenue laws. The defendant was collector of the Port of New York and removed the case by certiorari into the Federal court. A motion to remand was filed and the opinion, handed down in 1852 by Judge Betts and concurred in by Justice Nelson, dealt with the motion to remand. The court held that the acts of the defendant, which were the foundation of the suit, were performed by him in his *official character alone;* that he was acting under the law in determining the amount receivable, and in distributing the same; that the Act of March 2, 1833, gave official character to

the acts of such an officer done by him under color of the revenue laws, and even to those done by him under a claim of right derived from these laws; that his official relation did not end when the proceeds were placed in his hands, but that he was bound to dispose of them in a particular manner; that the fund was placed under his control in his official character; that the argument of plaintiff that he was entitled to have the cause remanded because the purpose of the suit was to charge defendant as a wrongdoer, was unsound since such a construction would nullify the Act of 1833, because in every case of prosecution against such a collector the purpose was to charge him with a personal liability for acts asserted to have been done wrongfully and without authority of law; that the purpose of the Act of 1833 was to place the jurisdiction over those questions between revenue officers and individuals in the Circuit Court of the United States, to the exclusion of State courts.

Fisk v. Union Pac. R. Co., 9 Fed. Cas. No. 4827, 6 Blatchford 362 (Circuit Court, New York, 1869), was instituted in the Supreme Court of New York and removed under the Act of July 27, 1868 (15 Stat. 226). On a motion to stay further proceedings in the State court, Judge Blatchford said:

> "It is quite apparent that the jurisdiction which congress intended to give, under this Act of 1833, where a suit or prosecution is commenced against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer, or other person, under any such law of the United States, is to be such a

jurisdiction, that a plaintiff in a state court shall not be able to deprive such officer or other person, who is sued on account of an act done under the revenue laws, of the right to remove the suit into a court of the United States, under this statute, by joining with him in the same suit other defendants who are not sued on account of acts done under the revenue laws. Thus to deprive the federal court of jurisdiction of the case, would be to deprive the officer or person justifying under the revenue laws, of the power to have his rights adjudicated from the commencement by the federal court, and to compel him to follow the case through the state courts in all of its stages, and finally take it, under the 25th section of the judiciary act, to the supreme court of the United States. No such construction of this law has been admitted, so far as I am aware. The manifest intent of this statute, in saying that 'it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit, or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the state court, shall be wholly null and void,' is to remove the suit. The suit goes into the federal court, with all the parties to the suit. Every party to the suit is brought into the federal court when the suit is brought there, and the court, in obtaining jurisdiction of the suit, obtains jurisdiction over all the parties to it. It is plain that this must be the construction of the act of 1833, or it would be mere waste paper. Otherwise, a plaintiff would have it in his power to deprive an officer of the United States, who justified his acts under the revenue laws, from ever removing the cause into the federal court by joining with such officer, as a defendant, some other person, on other causes of action, no matter how incongruous or irrelevant.

"The same principle applies to the act of March 3, 1863."

And so, evidently, should the same principle apply to the Act of 1916.

Fischer v. Daudistal, 9 Fed. 145 (Circuit Court, Pennsylvania, 1881), involved a suit of foreign attachment, brought in a State court, the attachment writ directing the Sheriff to attach certain goods held by the Collector of the Port of Philadelphia. The collector was summoned as garnishee, and plaintiff tendered to him the duties on wine held by him. A rule was issued to the Collector to show cause why he should not receive the duties and surrender the goods. He then secured a writ of certiorari removing the case into the Federal court. A motion to remand was made and without opinion it was overruled by the court. The collector did not appear to have had any personal interest in the suit.

Gallatin v. Sherman, 77 Fed. 337 (Circuit Court, New York, 1896), was an action by a landlord to recover from a lessee possession of premises used as a bonded warehouse, the Collector of Internal Revenue and a United States store-keeper being made parties defendant. The cause was instituted in a State court, and removed by certiorari into the Federal court. A motion to remand was filed, and in response thereto the defendants asserted that the property was held by them under and by virtue of the revenue laws, that it was the policy of said legislation to have all questions affecting the revenue laws of the United States and the authority of revenue officers, determined in Federal courts, and not to leave them to be jeopardized in courts of another jurisdiction. The motion to remand was denied. Here again no personal interest is apparent.

Ward v. Congress Construction Co., 99 Fed. 598 (C. C. A., 7, 1900), involved an injunction decree restraining the Construction Company from proceeding with the construction of an addition to a post office on certain property. A State court in Illinois had issued an injunction running to certain individuals, restraining them from placing any buildings or structures on the ground involved. The Construction Company was not a party defendant in this case. Subsequently, on motion served upon the Construction Company, the injunction order was broadened so as to include it. It then obtained a writ of certiorari removing the cause into the Federal court, which held, on motion to remand, that the case was removable. The court asserted that the involved section of the statute had been liberally construed as, for manifest reasons, it should have been. In his concurring opinion, District Judge Seaman stated:

> "The tests are (1) that the secretary of the treasury, by whom the work was ordered, was an officer administering the revenue laws of the United States, acting 'under color of his office,' and not that the act in question related to 'the raising of revenue' * * *, and (2) that new proceedings were pending in a state court against such action, wherein hearing was open to such officer and his agents."

It appears, therefore, that over a period of many years prior to the passage of the Act of 1916 the courts had liberally construed the Act of 1833 and its amendments and supplements, as was held proper in *Colorado v. Symes*, 286 U. S. 510. They had held, in an unbroken line of decisions, that personal interest or personal liability, as distinguished from official interest, was *not* essential to the right of removal.

When we bear in mind that the only substantial change effected by the 1916 amendment was to add another class of officers to those already entitled to the benefits of the Act of 1833, leaving the statute otherwise substantially unchanged, the conclusion is inevitable that Congress intended that the same rights should thereafter be enjoyed by officers of Federal courts as had previously been affirmed by the courts to revenue collectors and the like. *Sessions v. Romadka*, 145 U. S. 29; *Dollar Savings Bank v. United States*, 19 Wall. 227.

5—The Reasons Given in Ruff v. Gay for the Interpretation There Placed on the Statute are Unsound:

(a) It is said that for fifty years the policy of Congress "has been to restrict, not to enlarge, Federal jurisdiction." The greatest extension of Federal jurisdiction ever to occur arose from efforts to enforce the Eighteenth Amendment. The liquor laws at least did not restrict that jurisdiction. The Act of March 3, 1875 (18 Stat. 401), by which officers of Congress were given the right to remove, did not restrict Federal jurisdiction. Except for Acts restricting the jurisdiction of this Court and Acts increasing the amount required to give the District Court jurisdiction in cases of Federal questions, diversity of citizenship and the like, the great tendency, as this Court well knows, has been toward the aggrandizement of the Federal Government and its courts at the expense of the States. By reference to the history of the statute (*supra*, 33), it will be observed that, with respect to *this particular section*, the *constant* policy of Congress has been to enlarge rather than restrict its scope.

(b) It is said that this attitude was particularly

manifested in regard to suits against receivers by the Act of March 3, 1887. That Act *did not restrict* the jurisdiction of the Federal courts in actions against their receivers. It merely *permitted* actions to be brought against such receivers in other courts, State or Federal, without leave of the appointing court. If such an action against a receiver is brought in a State court, the receiver, under Section 71, may remove it to the Federal court if a proper ground exist, such as a Federal question or diversity of citizenship.

(c) It is said that Section 76, Title 28, U. S. C., relates "entirely to the removal of suits and prosecutions against revenue officers and officers of the Congress * * * having no relation whatever to receivers, nor even generally to removals." Even a casual reading of that section will disclose that it is *not* limited solely to revenue officers and officers of Congress. Its benefits extend to persons acting under or by authority of revenue officers, and to persons holding title derived from such officers. In most instances, these persons would hold no Federal office of any kind. The object of extending the benefits of the statute to "persons holding title derived from such officers" was obviously governmental and not at all personal. Its plain purpose was to so secure the title to be acquired in sales made by officers of the government that the price offered and paid by the bidder would be larger. The same observation might have been made with equal force with respect to the Act of 1875 respecting officers of Congress, and to every other Act by which additional classes are added to a statute.

In Chapter 3, of Title 28, U. S. C., we find the following sections describing the character of cases which

may be removed from State to Federal courts: 71, 73, 74, 76 and 77. No *one* section describes *all* cases which may be removed. All relate to removals, but necessarily each is somewhat specific. As the statute, before amendment in 1916, already provided for removals by officers of the executive and legislative branches of the Government, it seems not inappropriate, and certainly not "bizarre and fanciful," that the same section should have been selected for amendment with respect to suits against officers of the judicial branch.

(d) Reference is made to "a secret breach in the removal laws." The Act of 1916 is Chapter 399 of the Public Laws passed at the First Session of the Sixty-fourth Congress. It amended Section 33 of the Judicial Code of March 3, 1911. It was as public and as far from secret as any other public law of Congress.

(e) It is said that this "secret breach" was "in entire reversal of the settled policy of restriction." We have adverted above to the alleged "policy of restriction." Furthermore, in *Sonnentheil v. Christian etc. Brewing Co.*, 172 U. S. 401, and other cases, this Court had long before held that a suit against a Federal officer, such as a marshal or a postmaster, for acts done in the performance of official duties, was one arising under the laws of the United States, and as such, if the requisite amount were involved, removable to the Federal courts. Consequently, an amendment which merely changed the procedure by which a marshal might remove such a case, and taking away the restrictions upon him with respect to the amount in controversy, and making his right apply in criminal as well as civil cases, can hardly be said to be "in entire reversal of the settled policy of restriction."

(f) It is said that this "secret breach * * * opens the flood gates of the jurisdiction to pour into Federal courts all suits against Federal receivers." If it was the intention of Congress to open the flood gates leading to courts established by Congress which, under the Constitution, has full power to restrict or enlarge their jurisdiction, those courts will not shrink from the performance of their official duties. They will meet the exigency and discharge their functions as they did when they were given police court jurisdiction. In some measure, at least, the bar may be depended upon to avoid the imposition of any unjust burden on the Federal courts. Many actions against receivers can be litigated by them with equal success and with less expense in the State courts. This Court knows that the bar has not taken unreasonable advantage of the provision giving the District Courts jurisdiction over suits involving any law regulating interstate commerce.

(g) For the guiding rule of statutory construction the Court goes back to the decision, in 1584, in *Heydon's Case*, 76 English Reports Full Reprint, 637. The applicable rule, binding on the courts of the United States, was much later announced and reaffirmed in 1932, through Mr. Justice Sutherland in *United States v. Shreveport G. & E. Co.*, 287 U. S. 77. With this rule the Court was entirely familiar, because it stated that "significance and effect must, if possible, be accorded to every word of the statute." As we have shown above (pp. 15-33) the Court failed to do this.

(h) It is said that " 'all the mischief and defect' " which the amendment was designed to cure "was the failure of the statute to extend to officers of the United States courts the privilege of removal which before only rev-

enue officers and persons acting for them, and for the Congress, had enjoyed." As shown above, officers of Federal courts already had a right of removal under the decisions of this Court. The statute could have had no purpose except to enlarge and extend and facilitate this existing right of removal. It was necessarily creative rather than restrictive. If Congress had not intended to include *all* officers of court, it could easily have named the particular officers intended, such as judges, clerks, marshals, deputies and possemen. When it said "*officers*," it did not mean "*some* officers." It did not mean to leave it to the courts to speculate on *what* officers were intended.

(i) The committee report, of which so much is made, said that the purpose of the amendment was "to extend the provisions of Section 33 uniformly to officers of the courts of the United States * * * *in all cases*, giving to them the same protection *in all cases* now given to officers acting under the revenue laws, and to officers of the Congress." If the statute is construed with this purpose in mind, in the light of the history of the statute and the previous decisions of the courts, it is impossible to arrive at the conclusion reached in *Ruff v. Gay*.

Bearing in mind the purpose stated in the committee report and the previous decisions of the courts, it can only be said that the author of the report, in declaring that "the proposed amendment does not extend *in any degree* the jurisdiction or the powers of the courts of the United States," to some extent failed to foresee, or may, deliberately, have failed to state, the result of giving effect to the purpose so clearly expressed. But an erroneous statement of the effect of a bill by one member of one committee, or by an entire committee, may not

control the meaning which the courts must attribute to the solemn language of the whole Congress.

(j) As we will show below (p. 76-9), the attempted distinction of *Barnette v. Bank*, 270 U. S. 438, was not well grounded.

The reasons, therefore, which were assigned for the decision in *Ruff v. Gay* do not support the holding.

POINT IV.

MANDAMUS IS THE APPROPRIATE REMEDY TO SECURE TO PETITIONERS THEIR RIGHT OF REMOVAL

Petitioners presented to the District Court, while in session, their petition for removal and certiorari, as amended (Petn. for Mand., p. 10). Counsel for the plaintiff in the suit presented a reply (Petn. for Mand., p. 10). The Court heard arguments, received briefs and took the matter under advisement on October 19, 1933 (Petn. for Mand., p. 12). At the time of submission, at the direction of the Court, the petition, supplemental petition and reply were delivered to and filed with the clerk, but he did not then or later endorse the same as having been filed with him (Petn. for Mand., p. 11).

On November 20, 1933, the Court returned to counsel for petitioners the original and supplemental petitions for removal, and the reply thereto with the following order or direction endorsed thereon and signed by the Judge, to-wit:

> "The foregoing Petition for Removal and Certiorari and Exhibits attached and referred to, shows that the suit sought to be removed to this Court is not a suit in which Plaintiff seeks to hold L. W. Baldwin and Guy A. Thompson, Trustees, responsible in their own person and/or property, but only in their representative capacity. It is, therefore, denied. See Ruff v. Gay, C. C. A. (5th), No. 7008, decided November 15, 1933." (Petn. for Mand., p. 12).

It is apparent that from this action of the Court, which was equivalent to a refusal to take jurisdiction, no appeal or writ of error lies to the Circuit Court of

Appeals under Section 128 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936), and by the Act of April 3, 1926 (44 Stat. 233), the Act of February 28, 1927 (44 Stat. 1261), and the Act of April 11, 1928 (45 Stat. 422) (all of which will be understood to be included when reference is made to said Act of February 13, 1925). The refusal to take jurisdiction was not a final decision, nor was it an interlocutory order such as may be reviewed by the Circuit Court of Appeals under that section. Neither is it such an interlocutory order as may be reviewed by the Circuit Court of Appeals under Section 129 of the Judicial Code, as amended by said Act of February 13, 1925.

The order clearly may not be reviewed by this Court on appeal or error under Section 237 of the Judicial Code, as amended by said Act of February 13, 1925. That section deals solely with the review of final decisions in the highest court of the State.

Nor has this Court jurisdiction by appeal, error or otherwise under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925. There being no method of review by appeal or error to the Circuit Court of Appeals, this Court can have no jurisdiction under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

In short, it is plain that a refusal of the District Court to take jurisdiction of the suit sought to be removed cannot be reviewed either by this Court, or by the Circuit Court of Appeals, on appeal, error or certiorari, and that the only method of correcting the error committed below is by a writ of mandamus which may be issued under Section 377 of Title 28, U. S. C., either by this Court or by the Circuit Court of Appeals. *Ex Parte United States,* 287 U. S. 241. In that case the Court said:

"Section 716 Rev. Stats. (Title 28, Section 377, U. S. C.) provides that this court and other federal courts 'shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.' As early as 1831 it was settled that this court had power to issue a mandamus directed to the federal Circuit Court commanding that court to sign a bill of exceptions, such action being in the nature of appellate jurisdiction. In re Crane, 5 Pet. 190, 193. * * * McClellan v. Carland, 217 U. S. 268, 280, 30 S. Ct. 501, 54 L. Ed. 762, laid down the general rule applicable both to this court and to the Circuit Courts of Appeals, that the power to issue the writ under R. S. Sec. 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'"

The Court referred to *Los Angeles Brush Mfg. Corp. v. James*, 272 U. S. 701, and said:

"In that case an application for mandamus was made to this court to compel a District Court to hear a patent case, instead of referring it to a master, in alleged violation of Equity Rules 46, 59 (28 U. S. C. A. Sec. 723)."

The writ applied for was issued.

In *Ex Parte Bradstreet*, 7 Pet. 634, this Court issued a writ of mandamus directed to a Federal District Court of New York requiring that a cause, which had been dismissed for lack of jurisdiction, be reinstated on the

docket, tried and decided according to law. Chief Justice Marshall, delivering the opinion, held that the District Court had jurisdiction and that it should be compelled to exercise it.

Ex Parte Parker, 120 U. S. 737, involved a petition for mandamus to the Supreme Court of the Territory of Washington. In the case involved, plaintiff had recovered judgment below and defendant had appealed. The case was docketed in the Supreme Court of the territory, and a motion to dismiss the appeal was filed and allowed. This Court granted a writ of mandamus, requiring the reinstatement of the appeal, saying:

> "The Supreme Court refused to hear the cause and to decide it upon it merits, because it considered that the cause was not lawfully before the court; that the parties were not in court for the purpose of an appeal. This presents a case for the exercise of the jurisdiction of this court in *mandamus* according to the principles and practice applicable thereto. That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged errors occurring in the exercise of its judicial discretion within its jurisdiction. As was said in Ex Parte Brown, 116 U. S. 401 (29:676) '*Mandamus* lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction.'"

The same matter came again before this Court in *Ex Parte Parker,* 131 U. S. 221, involving another dismissal of an appeal. This Court held that the appeal

was not a matter which could be refused by the Court in its discretion; that "rights, under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise." The Court further said:

> "It is also objected that mandamus is not the proper remedy for the petitioner, under the decision in Ex Parte Brown, 116 U. S. 401 (29:676). There the supreme court of the Territory entertained jurisdiction of the cause which was brought before it by appeal, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with rules of practice applicable to the form of the action; and we held that the judgment could only be reviewed here on writ of error or appeal, as the case might be. In the case before us, the supreme court of the Territory dismissed the appeal because not properly taken, that is, because the cause had not been brought before it from the lower court. The distinction in the two cases is obvious: in the one, the court below had taken jurisdiction and acted; but in the present case it refused to take jurisdiction. The right of mandamus lies, as held in Ex Parte Parker, 120 U. S. 737 (30:818) where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion. Ex Parte Morgan, 114 U. S. 174 (29:135); Chateaugay Ore and Iron Co., Petitioner, 128 U. S. 544, 557."

Ex Parte Schollenberger, 96 U. S. 369, involved a petition for mandamus requiring the judges of the Circuit Court of the Eastern District of Pennsylvania to hear and determine certain suits brought in that court

against a number of insurance companies incorporated in other states. The Circuit Court refused to take jurisdiction because at the time the suits were filed, and thereafter, the insurance companies were not residents of nor to be found in the district. A State statute of Pennsylvania required, as a condition precedent to the right to do business in that State, that a foreign company consent to be "found" within the territory for the purpose of service of process in a suit. This Court held that service having been had on each of the insurance companies, the Circuit Court had jurisdiction of the case, and the writ of mandamus was accordingly granted.

Grossmayer, Petitioner, 177 U. S. 48, involved a petition for a writ of mandamus to the District Judge of the United States for the Eastern District of Texas, requiring him to enter judgment by default for petitioner in an action brought by him in that court. The court had declined to enter such a judgment, due to its conclusion that the service on defendant was insufficient. The court held that a writ of mandamus could not be used to perform the office of an appeal or a writ of error, and that hence a final judgment could not be reviewed by writ of mandamus, but that if the court, after sufficient service on defendant, had erroneously declined to take jurisdiction of the case, or to enter judgment therein, a writ of mandamus could issue to compel it to do so. It was further held, however, that the Circuit Court was correct in its conclusion that proper service had not been had and the writ of mandamus was accordingly denied.

The present situation is not essentially unlike those cases in which this Court has issued a writ to compel

the assembling of a three-judge court to hear and determine a controversy in which three judges are required. See *Ex Parte Metropolitan Water Co.*, 220 U. S. 539, *Ex Parte Northern Pacific Rd. Co.*, 280 U. S. 142.

We respectfully submit that a writ of mandamus is the appropriate remedy and the only remedy to secure to petitioners their right of removal under Section 76 of Title 28, U. S. C.

The writ applied for is not asked to control any discretion vested in the District Court or the Judge thereof. Under the statute, if the case be in law a removable case, as we have shown it is, and if the party seeking the removal has complied with the requirements of the statute, as the petitioners have, the District Court has no discretion under the statute. The statute makes it the *duty* of the District Court in such cases to take jurisdiction of the suit, to secure the record by the issuance and service of a writ of certiorari, and to proceed to hear and determine the case. As was said in *Dennistoun v. Draper*, 7 Fed. Cases, No. 3804, the statute is peremptory.

In *Colorado v. Symes*, 286 U. S. 510, Mr. Justice Butler, referring to the statute under which the removal was sought in this case, said:

> "The various acts of Congress constituting the section as it now stands were enacted to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power. Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Maryland v. Soper (No. 1), 270 U. S. 9, 32, 46, S. Ct. 185, 70 L.

Ed. 449; Nashville v. Cooper, 6 Wall. 247, 253, 18 L. Ed. 851; Findley v. Satterfield, Fed. Cas. No. 4, 792. It scarcely need be said that such measures are to be liberally construed to give full effect to the purposes for which they were enacted."

Unless this Court shall take jurisdiction of the present controversy and grant the writ as prayed for, the statute cannot "be liberally construed to give full effect to the purposes" for which it was enacted.

POINT V.

THE RIGHT TO MANDAMUS IS NOT DEFEATED BY THE STATUTE CONCERNING THE FINALITY OF ORDERS REMANDING SUITS TO STATE COURTS

Section 71, Title 28, U. S. C., contains the following provision:

> "Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

This relates only to orders remanding causes to State Courts. It does not in terms include a refusal of the District Court to accept a case and docket the same where procedural rules have been followed. The meaning of the words contained in the statute is plain. It cannot preclude the issuance of a writ of mandamus in the present case, unless the terms contained therein are given a meaning beyond their usual and common significance. Attention in this connection is directed to the authorities reviewed under Point III, with respect to the construction of statutes whose meaning is plain. (*Supra*, 15.)

A reading of the decisions of this Court on the above provision of the statute might, at first blush, indicate that the Court has given it a rather broad interpretation. Careful study of these cases will show, however, that they have gone no further than is fairly required by a literal reading of the section. It provides that when a

cause has been remanded "such remand shall be immediately carried into execution," and the courts carried out the intention of Congress as manifested in this section of the statute. Thus, in *Morey v. Lockhart* (1887), 123 U. S. 56, it was held that an order of the Circuit Court remanding a case to the State court could not be reviewed by appeal or writ of error. This, of course, is plain from the positive terms of the statute.

Three years later, the Court held that an order remanding a cause could not be reviewed by mandamus. *Ex Parte Pennsylvania Company,* 137 U. S. 451. In this case the Court held that its general power to issue writs of mandamus was unquestioned; that under its prior decisions a writ of mandamus would lie to compel a court to reinstate a case on its docket which had been improperly remanded to the State court, but that the matter was governed by statute, and that the recital therein that "such remand shall be immediately carried into execution" was sufficient to preclude the remedy of mandamus.

In a later decision, *Missouri Pacific Railroad Company v. Fitzgerald,* 160 U. S. 556, the Court decided that the action of a Federal Circuit Court in remanding a cause to a State court could not be reviewed by writ of error to the State court after the cause had been tried therein and appealed. These decisions have been followed in later cases. *Illinois Central Railroad Company v. Brown,* 156 U. S. 386; *McLaughlin Bros. v. Hallowell,* 228 U. S. 278; *Yankaus v. Feltenstein,* 244 U. S. 127; *Matter of Matthew Addy Steamship & Commerce Corp.,* 256 U. S. 417.

It will be observed from these decisions that *in each case,* the Court was called upon, by writ of error, appeal, or petition for mandamus, to review a decision of a

District or Circuit Court *remanding* a case to the State Court, *after* it had previously been removed to the Federal Court, and *under the literal terms of the statute* it has necessarily held that such orders could not be reviewed.

It is evident that a wholly different situation is here presented. Section 76, Title 28, U. S. C., sets out in explicit terms the procedural steps to be followed in order to *secure* a removal thereunder. These steps have here been followed. The statute confers a positive right when the petition for removal complies with the requirements of the statute. The District Court is not vested with discretion to receive it; the terms of the statute are mandatory. It provides that "the cause *shall* thereupon be entered on the docket of the District Court and *shall* proceed as a cause originally commenced in that court." It further provides that the clerk of the District Court *shall* issue a writ of certiorari to the State court requiring it to send to the District Court the record and the proceedings in the cause. The statute is peremptory. *Denniston v. Draper*, 7 Fed. Cases, Case 3804.

Section 76 provides not only for the issuance, but also for the *service* of the proper writ (certiorari, habeas corpus, etc.) for bringing the case into the District Court and it then declares that "upon *delivery of such process*" the suit "shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void." In other words, under the clear terms of the statute, the State court continues to have jurisdiction of the suit, and power to proceed therein, until it is *served* with process issued out of the Federal court. And the suit is not to "be held to be removed to the District Court" *until* the process of the Federal court has been served.

Turning now to the provision quoted from Section 71, it will be observed that there are certain indispensable prerequisites to the effect of finality given by that section to an order remanding a cause. First, the cause must have been "removed from any State court into any District court of the United States." Second, the District court shall have *decided* "that the cause was improperly *removed*." Third, the District court must have *ordered* that the cause "be remanded to the State court *from whence it came*." *All three* of these prerequisites must coincide, under the simple language of the statute, before the order remanding the cause shall be treated as final and not subject to review.

In this case, *none of these prerequisites is present.* The cause has not been removed to the District court, because there has been neither Federal court process, nor service thereof. There having been no removal, the District court could not have decided that the cause was *improperly* removed. Neither did the District court "order the same to be remanded to the State court from whence it came." The order signed by Judge Kennerly on November 20, 1933, simply "denied" the petition for removal and certiorari.

It is apparent, therefore, that the statute relating to the finality to be attributed to orders remanding causes to State courts has no application whatever to the situation presented by this petition. It does not touch the case, top, side or bottom.

The history of the statute supports this interpretation. Prior to 1875 appeal or writ of error from an order remanding a cause to a State court would not lie, because such an order was not a final judgment. Mandamus was the proper remedy. See *Chicago & Alton R. Co. v. Wiswall,* 90 U. S. 507. The Act of March 3,

1875 (18 Stat. 470) contained a provision which permitted an appeal or writ of error from an order remanding a cause. Still later, by the Act of March 3, 1887 (24 Stat. 553), the provision above quoted and now contained in Section 71, was placed in the statute. The statute of which this provision forms a part was offered as H. B. 2441. When the measure reached the Senate certain amendments were inserted, including this provision. Sections 3 and 5 were also added by the Senate. These read:

> "Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."
>
> "Sec. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections 641, or in 642, or in 643, or in 722 or in title 24 of the Revised Statutes of the United States, or mentioned in Section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1, 1875, entitled 'An Act to protect all citizens in their civil and legal rights.'" (Congressional Record, Second Session, 49th Congress, pp. 2542-3.)

Each of these amendments was apparently adopted without discussion. Section 5 of the act quoted above makes it perfectly plain that it was not the intention of Congress to add to or detract from rights enjoyed under

Section 76, Title 28 of the Code, for reference is expressly made in this saving clause to Section 643 of the Revised Statutes, which is the same, with certain amendments, as the present provision of Section 76 of the Code.

This court has often held that it possesses unquestioned power to control by mandamus the action of lower Federal courts in refusing to docket and hear causes over which they have jurisdiction.

That power is not affected, in even the slightest degree, by the quoted provision of Section 71. It can only apply to a case which has been removed. This case has *not* been removed.

POINT VI.

THIS COURT SHOULD TAKE JURISDICTION OF THE PRESENT CONTROVERSY

That this Court *can* assume jurisdiction of the present controversy, and *can*, in its discretion, issue its writ of mandamus, as prayed for, seems clear. *Ex Parte Parker*, 120 U. S. 737, *Ex Parte United States*, 242 U. S. 27, *Ex Parte United States*, 287 U. S. 241, Title 28, Section 377, U. S. C. In the case last cited the Court said:

> "McClellan v. Carland, 217 U. S. 268, 280, laid down the general rule applicable both to this Court and to the Circuit Court of Appeals, that the power to issue the writ under R. S. Section 716 (Title 28, Section 377, U. S. C.) is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that 'where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'"

If the suit instituted in the State court and involved in the present controversy is removable, as petitioners contend it is, it is clearly one which the Circuit Court of Appeals may review on appeal under Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936); and is one which this Court, under Section 240 (a) of the Judicial Code, as amended by the same act of February 13, 1925, may review by certiorari. This brings the matter directly within the scope of the further statement contained in the opinion just quoted from:

> "We prefer, however, to put our determination (of the power to issue the writ of mandamus to a

District Court) upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the Circuit Court of Appeals, in which such immediate and direct appellate jurisdiction is lodged."

Bearing in mind that the power to issue the writ here applied for is reposed by the statute (Title 28, Section 377, U. S. C.) in the Circuit Courts of Appeals as well as in this Court, and that this Court, therefore, has jurisdiction concurrent with the Circuit Court of Appeals for the Fifth Circuit to issue the writ here sought, we address ourselves to the question whether this Court should take jurisdiction, or should refuse the writ without prejudice to the right of petitioners to apply to the Circuit Court of Appeals.

1. In view of the recent decision of the Circuit Court of Appeals for the Fifth Circuit in *Ruff v. Gay, supra*, it seems not unreasonable to assume that the writ would be refused by that Court, and that petitioners would thereupon be relegated to a petition to this Court for a writ of certiorari to review the decision of the Circuit Court of Appeals. This Court plainly has jurisdiction in the first instance. In either case the application is addressed to the discretion of this Court. It certainly will not require petitioners to make to the Circuit Court of Appeals an application which is probably foredoomed to be fruitless, and only permit them to come to this Court after their application to the Circuit Court of Appeals has been denied. This Court abhors circuity of action.

2. By paragraph 5 (b) of the 38th Rule of this Court,

a conflict of decisions between different Circuit Courts of Appeals is recognized as one of the grounds upon which this Court should exercise its discretion, on certiorari, and assume jurisdiction of a controversy. The decision in the Fifth Circuit in *Ruff v. Gay, supra,* is squarely in conflict, not only with the decision in the Eighth Circuit in *Newell v. Byram,* 26 Fed. (2d) 200, but also is in conflict with the decision of this Court in *Barnette v. Bank,* 270 U. S. 438.

As we read the opinions in that case, the division between the members of the Court was not caused by any diversity of opinion respecting the removability of the suit; but rested on the propriety of indulging the presumption, in the absence of a full record, that the removal had been rightly taken under the statute here in question.

The facts in the case at bar are almost identical with those which the Court there considered. Here, as there, the suit in the State court was for cancellation of a deed to land, held in his official capacity, by a receiver in that case and by bankruptcy trustees in this. In that case damages also were sought to be recovered from the receiver. Here, damages are prayed for against all petitioners, including the trustees in their official capacity. Based on the citation from *McNulta v. Lockridge,* 141 U. S. 327, contained in the opinion in *Ruff v. Gay,* both of these—

> "are in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

Otherwise stated, both suits aimed at the property held

by the court's agent; both were strictly official and impersonal; *except* that in this case, *as to the corporate petitioners, the suit is personal as well as official,* since *they* are sought to be charged in both capacities.

Yet in the *Barnette* case (at p. 441), Mr. Justice Stone, speaking for the majority, declared:

> "Such a suit *was removable* under Sec. 28 of the Judicial Code as supplemented by the amendment of Sec. 33 by the Act of August 23, 1916 * * * The receiver was acting in virtue of authority conferred on him as officer of the Alaska court" (Italics ours).

And indeed, Mr. Justice Brandeis, in the dissent concurred in by Mr. Justice Sanford, did not say—clearly he did not mean to say—that the cause was *not removable* under the Act of 1916. He said:

> "Jurisdiction could not be sustained under Sec. 33, Judicial Code, as amended by the Act of August 23, 1916 * * * as a civil suit against 'an officer of the courts of the United States * * *' because there is nothing to show that removal was sought upon this ground, or that the requirements of the statute were complied with * * * or that there was 'a causal connection between what the officer has done' and his asserted official authority."

Implicit in that statement is the belief that if the removal had been sought upon that ground, and the requirements of the statute complied with, and the requisite causal connection disclosed, the case *was* removable under the statute cited.

As shown in the opening paragraph, the dissent went on the theory that, even conceding the removability of

the case, the Court had no right to presume the facts on which its jurisdiction depended.

We fail to see how it can be maintained, as said in *Ruff v. Gay*, that "the holding of the majority opinion * * * was * * * a purely suppositious one, and therefore not binding as a precedent." In his dissent, Mr. Justice Brandeis carefully pointed out that—

> "'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this Court, and then of the court from which the record comes. *This question the Court is bound to ask and answer for itself*, even when not otherwise suggested, and without respect to the relation of the parties to it'" (Citing cases, Italics ours).

It was that precise question of jurisdiction which the Court, in the *Barnette* case did "ask and answer for itself, even when not otherwise suggested."

Being essential to the jurisdiction of the Court, the answer to the question was indispensable to the decision of the case. The record showed that the case *could* have been removed under the statute with which we are concerned here. The majority *presumed* that it had been. It held definitely that *such a case is removable*. On that holding we plant ourselves. It was made and it was right.

3. The papers attached to this petition for mandamus show clearly the anomalous position in which the trustee petitioners are placed by this conflict of decision. They are shown to be trustees for the Missouri Pacific Railroad, which has its principal operating office and at least a portion of its railroad in the Eighth Circuit (Petn. for Mand., pp. 28, 29). In that Circuit, under the decision in *Newell v. Byram*, the trustee petitioners enjoy

the right of removal sought in the present instance. They are also trustees for certain railroads in Louisiana and Texas, situated in the Fifth Circuit (Petn. for Mand., p. 38). In that Circuit the decision in *Ruff v. Gay* denies them the right of removal.

The same trustees, appointed by a single District Court, in a single proceeding instituted under Section 77 of the National Bankruptcy Act, are freely conceded the right to remove in some States of the Union, yet in other States that right is denied them. This egregious situation is not brought about by conflicting decisions of courts of the several States; but grows out of a conflict of decision between Courts of the Federal Government, and an apparent failure, in at least one instance, to recognize the binding effect of the decisions of this Court.

4. Paragraph 5 (b) of the 38th Rule of this Court indicates other grounds upon which this Court may well take jurisdiction of the present controversy. It is believed that in *Ruff v. Gay* the Circuit Court of Appeals for the Fifth Circuit "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority" and "has decided a federal question in a way probably in conflict with applicable decisions of this Court."

The question of the right to remove such suits is now an especially important question of general law, because of the recent amendment to the Bankruptcy Act providing for the reorganization of railroads (47 Stat. C. 204). The Congress, by the Act of March 3, 1933, has clearly shown its intention to throw about faltering railroads the protecting mantle of the Federal Courts. Whether, in their official litigation, concerning the settlement and administration of those great estates, trustees appointed

under that Act may resort to the Courts of the Nation is certainly an important question.

In the present case it is doubtful whether the suit can be removed on the ground of diversity of citizenship. Certainly, that cannot be done unless the controversy against the trustee petitioners is separable from the controversy between the plaintiff and the other defendants in the suit. That is by no means certain.

In *Ex Parte United States*, 287 U. S. 241, this Court said:

> "The rule deducible from the later decisions and which we now affirm, is that this court has full power in its discretion to issue a writ of mandamus to a federal District Court, although the case be one in respect of which direct appellate jurisdiction is vested in the Circuit Court of Appeals—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken."

In the present instance we appeal to this Court for an exercise of that discretion. In support of that appeal we assert not only that the matter involves a question of public importance but also that the matter arises in such a way and is of such a nature "that it is peculiarly appropriate that such action by this Court should be taken."

In the case just cited, involving a writ of mandamus to compel the issuance of a bench warrant for the arrest of a person indicted by a grand jury, the application might well have been made to the Circuit Court of Ap-

peals. From the opinion, at least, it does not appear that there was reason to apprehend that the Circuit Court of Appeals would have refused such an application. In the present case, without indicating even the slightest disrespect for the Judges who participated in the decision in *Ruff v. Gay*, there is ample reason to believe that if the present petition should be addressed to them, the relief sought would be refused.

To avoid unnecessary delay and circuity of action, we respectfully appeal to this Court to take jurisdiction and issue the writ.

Petitioners therefore ask that they be granted the relief sought.

Respectfully submitted,

EDWARD J. WHITE,

FRANK ANDREWS,

ROBERT H. KELLEY,

Attorneys for Petitioners.

Houston, Texas.
December 4, 1933.

APPENDIX

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Constitution of Texas, Article V, Section 8:

"Sec. 8. The district court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the state to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest; of contested elections; and said court, and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators, and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors, under such regulations as may be prescribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under

such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution, and such other jurisdiction, original and appellate, as may be provided by law."

Revised Civil Statutes of Texas, 1925, Article 1971:

"Article 1971: Civil suits in the district and county courts shall be commenced by petition filed in the office of the clerk."

Texas Code of Criminal Procedure, Article 504:

"Article 504: The primary pleading in a criminal action on the part of the State is the indictment or information."

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

BRIEF OF TYRRELL & GARTH INVESTMENT COMPANY, PLAINTIFF IN THE STATE COURT, IN OPPOSITION TO THE ISSUANCE OF MANDAMUS

LON E. BLANKENBECKER,
Attorney for
Tyrrell & Garth Investment Company,
Plaintiff in the State Court.

RICHARD W. FRANKLIN,
Of Counsel.

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Under the provisions of Title 11, Sec. 46(a), of the United States Code relating to bankruptcy, the United States District Courts have jurisdiction between trustees and adverse claimants concerning the property acquired or claimed by the trustee in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants 21

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tion upon the jurisdiction of Federal Courts in actions against trustees in bankruptcy as governed by the terms of Title 11, Sec. 46(a), U. S. C., as enacted in 1898. The trustees in bankruptcy of railroad corporations appointed pursuant to the 1933 amendment are still only bankruptcy trustees for Federal jurisdictional purposes. Said trustees in bankruptcy of railroad companies under the 1933 amendment are not entitled to remove to the Federal Courts actions against them as such otherwise than in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and adverse claimants 28

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Repeals by implication, under a long line of decisions by the Supreme Court, are not favored. Moreover, Sec. 46(a) is a prior statute (1898) relating to the PARTICULAR CASE involving jurisdiction of the Federal Courts with respect to trustees in bankruptcy; while the amendment to Sec. 76 (1916) is a subsequent law

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

BRIEF OF TYRRELL & GARTH INVESTMENT COMPANY, PLAINTIFF IN THE STATE COURT, IN OPPOSITION TO THE ISSUANCE OF MANDAMUS

The return by Honorable Thomas M. Kennerly, Judge of the District Court of the United States for the Southern District of Texas, to the rule shows in substance that the cause was heard and considered in the court below on the petitioners' application and amendment thereto for removal and certiorari, and upon the Answer thereto by Tyrrell & Garth Investment Company in opposition to removal. To the Answer was attached copy of its petition in the State Court and also copy of an order entered by it in the State Court dismissing such part of its cause of action in the State Court as sought an injunction against petitioners.

We desire to observe at the outset that the statement of the nature of the case as made in this Court by the petitioners for mandamus is too meager and detached to give this Court any comprehensive understanding of the controversy in the State Court.

We, therefore, present the following:

Additional Statement of the Nature of the Suit in the State Court and of the Proceedings in the District Court of the United States

The suit in the State Court was against Houston North Shore Railway Company and its lessee Beaumont, Sour Lake & Western Railway Company, both owing their corporate existence to the laws of Texas and having their domiciles therein, and against L. W. Baldwin and Guy A. Thompson, the latter two as trustees in bankruptcy of said two railway defendants, under appointment of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri. Such appointment of said trustees in bankruptcy was made in cause No. 6935, in the Matter of Missouri Pacific Railroad Company, in proceedings for the Reorganization of a Railroad under amendments to the Bankruptcy Act of Congress of 1933. This Act will be hereinafter more fully referred to and discussed. Harry K. Johnson, a resident of Texas, was also a party defendant in the State Court, and his connection with the case will appear briefly in the statement of the case we are about to make.

Plaintiff Tyrrell & Garth Investment Company, for its cause of action alleged that its predecessor, W. C. Tyrrell Trust (to all of whose rights it became successor), being desirous of having an interurban railway

constructed to and through its several thousand acres of land in the vicinity of Houston, for the purpose of adding to the value of its lands, entered into a contract in writing with Harry K. Johnson for its promotion and operation. It was agreed with said Johnson to convey to him, as promoter of the railroad, a right of way, subject to forfeiture for non-user and failure of operation. The terms non-user and failure of operation, as used in the contract, were therein specifically defined. "Non-user" was defined as failure to operate as an interurban railroad for thirty successive days. "Operation" was defined as including a passenger schedule over which first-class coaches operated by electricity or gas engines must be run over the entire line of about thirty miles on a regular schedule of at least one train not less than every two hours from 6 A. M. until midnight.

As further consideration, there was conveyed to Johnson about eleven hundred acres of land as a bonus. Plaintiff further alleged that failure to furnish the prescribed interurban schedule not only resulted, under the terms of the contract, in the forfeiture of the right of way but, more especially, that such failure to operate it constituted a breach of the contract, resulting in large damages to plaintiff by reason of decreased value of their lands.

It was alleged that the privileges and obligations of Harry K. Johnson under said contract passed to the Houston North Shore Railway Company, which assumed the benefits and obligations of the contract; that the railway was duly constructed and put in operation by the latter, and that for several years the contract was carried out and performed by the parties according to its terms.

Plaintiff alleged that in December, 1931, the defend-

ant railways discontinued and since then have ceased operation of electric passenger coaches into the City of Houston, in breach of the contract to operate the schedule over the entire line as in the contract provided, and that the operation of the cars did not include passing over the entire right of way, as set forth in the contract and right of way deeds. Plaintiff further alleged that in February, 1933, the defendant railway companies wholly stopped and that since said time they have ceased maintaining any interurban passenger service over the entire line of railway and over the donated rights of way on a regular schedule of at least one train not less than every two hours of each day from 6 A. M. until midnight, as in said contract and right of way deeds agreed to be done. Plaintiff alleged in detail the violation of the contract in the respects above mentioned.

Plaitniff alleged that it elected to declare a forfeiture, under the terms of the contract, of said easements and rights of way on account of said breaches of the contract, and to declare that the railway companies and their said bankruptcy trustees had no further rights or privileges therein by the terms of the contract and under their deeds, and prayed that the latter should be cancelled and held for naught. It was further alleged that the failure to maintain the passenger service agreed to be furnished and the permanent curtailment and limitation of the service had resulted in great depreciation of the market value of plaintiff's lands by reason of making them less accessible and convenient to transportation; that said violations of the contract had depreciated the value of its property in the sum of $150,000.00, in which amount it had been damaged.

It was alleged that the consideration on which it had donated the eleven hundred acres of land as a bonus had

at least partially failed, and plaintiff prayed for judgment for an equitable diminution and recovery on account thereof.

Plaintiff prayed for judgment against the railway companies and their bankruptcy trustees for cancellation of the right of way deeds covering several miles of the right of way, under the terms of the contract relating to forfeiture, and for its damages of $150,000.00 for breach of contract to maintain the local intrastate passenger interurban schedules provided for in the contract, and for a recovery against Harry K. Johnson growing out of partial failure of consideration from said donation of eleven hundred acres of land.

Plaintiff further prayed that on final hearing, in event judgment was rendered for cancellation of the right of way deeds, the railway companies and their trustees be enjoined from further use for railway purposes of the forfeited rights of way. (R. 63-83.)

Prior to hearing of the motion for certiorari to remove to the Federal Court, plaintiff dismissed so much of its cause of action in the State Court as sought any injunctive relief against the railway defendants and their trustees in bankruptcy (and tendered to the United States District Court a certified or admitted copy of such decree of dismissal), without prejudice to plaintiff thereafter to seek such injunctive relief against said *railway companies* "when and if they shall be discharged from jurisdiction and control of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri" (R. 61).

Plaintiff's petition in the State Court did not seek to interfere with the control of the District Court of Missouri in the administration of the properties, but prayed for "such relief, special and general, legal or equitable,

as against all the defendants including said trustees as it may be properly entitled to receive" (a permissible and effective prayer under the practice in Texas, where all legal and equitable distinctions of pleadings in causes of action have been abolished and the two systems blended). *Const. of Texas*, Art. V. Sec. 8; Art. 1906; Art. 2003, Revised Civil Statutes of Texas, 1925; *De La Vega v. League*, 64 Tex. 205; *Georgetown Mercantile Co. v. First Natl. Bank*, 165 S. W. 73; *Banks v. Blake*, 143 S. W. 1183. Moreover, plaintiff, still seeking not to interfere with the Missouri Court, further in the State Court prayed that its *"said judgment be certified to the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, for observance"* (R. 83).

POINT I

The Allegations Made by Plaintiff in the Suit in the State Court Show on Their Very Face That the Cause Is Not Removable Under Sec. 76, Title 28, U. S. C.

Sec. 76, Title 28, merely provides for removal "for or on *account of any act done* under color," etc. It is obvious from plaintiff's petition in the State Court that the trustees in bankruptcy were not sued for or on account of "*any act done*" by them.

This is clearly shown by the fact that plaintiff alleged that in *December, 1931, the railway companies* stopped and have since ceased operation of electric passenger coaches into the City of Houston, in breach of the agreement to operate the schedule over its entire line as in the contract provided (R. 75), and that in *February, 1933, the railway companies* stopped, and they and defendant trustees have since said time ceased, maintaining passenger service passing over the entire line of railway on a regular schedule of at least one train not less than every two hours of each day from 6 A. M. until midnight (R. 76). These two alleged violations of the contract constitute the gravamen of plaintiff's cause of action as shown by its petition in the State Court (R. 63-83). These are the only respects in which it is alleged the contract has been violated.

Now, turning to the exhibits attached to petitioners' petition for removal, it is shown by the certified copy of the order of the Missouri Court appointing the bankruptcy trustees of defendant railway companies that they were not appointed such until *June 22, 1933* (R. 46-49), when their temporary appointment was provided for. The order appointing them was not made permanent until *July 25, 1933* (R. 50-55).

The allegations of plaintiff's petition in the State Court were that the contract and deeds "*provided that the defendants were to have and hold the same as an easement or right of way for the construction and operation of an interurban railroad upon the following conditions, viz: that the right of way and occupancy of said land should be forfeited in the event of failure to operate thereon an interurban railroad for a period of 30 successive days, exclusive of such time as operations might be prevented by conditions over which grantee had no control.*" The petition continues: "It was provided in said deed that operations as an interurban railroad, as therein contemplated, must include a passenger schedule with first-class coaches operated by electricity or gas engines, passing over the entire right of way therein or thereafter granted by said Johnson or his successors in interest to defendant Houston North Shore Railway Company; said coaches to be operated on a regular schedule of at least one train not less than every two hours from 6 A. M. until 12 o'clock midnight."

Thus it is shown that the *acts* complained of giving rise to plaintiff's cause of action were begun and completed by the railroad companies long before the appointment of the trustees and before the bankruptcy petition of the railway defendants was filed, which was on *May 2, 1933* (R. 37-41).

The contract on which suit was brought provided, as alleged by plaintiff, that "non-user" was *failure to operate* as an interurban railroad for a period of *thirty successive days;* and "operation as an interurban railroad" was defined therein as "a passenger schedule over which first-class coaches, operated by electricity or gas engines must be run over the entire line on a regular schedule of at least one train not less than every two

hours of each day from 6 o'clock A. M. until 12 o'clock midnight."

With these definitions in the contracts and alleged in plaintiff's petition, it follows necessarily that the breach of the contract was complete thirty days after the breaches began and, therefore, long before the bankruptcy petitions were filed. To say the very least, the breach was complete *thirty days after February, 1933*, when the two-hour schedule ceased, to say nothing of the failure to operate interurban electric coaches over the entire line, which was discontinued and has ceased ever since *December, 1931*.

Consequently, the trustees were not sued "for or on account of any *act done* under color of (his) their office or in the performance of (his) their duties as such officers," the language of the statute. Plaintiff pleads in its petition in the State Court that the forfeiture and breach of contract were complete before any adjudication in bankruptcy was had, viz, thirty days after the respective omissions began on December, 1931, and February, 1933.

The status of the trustees and the railway defendants in bankruptcy merely is that after the adjudication on May 2, 1933, and the appointment of the trustees on June 22, 1933 (R. 46-49), they acquiesced in what the railroads themselves had long prior already done. The trustees merely did nothing about it after their appointment.

The acts done were begun and completed by the railway defendants prior to bankruptcy, and the cause of action alleged by plaintiff was completed long before the Missouri Court acquired any jurisdiction. The trustees and the bankrupts have merely not tried to rectify the breaches of contract by the railroad companies, and

by virtue of which breaches it is alleged by plaintiff that the forfeiture and breaches of contract were complete before bankruptcy ensued.

Indeed, it would not have affected plaintiff's cause of action if the trustees and the railroads (after adjudication was made) had begun to maintain the schedules and perform the contracts. *Therefore the railroads themselves had completed plaintiff's cause of action before they came under the jurisdiction of the District Court of Missouri.*

It seems, therefore, quite clear that Sec. 76, under which the removal is sought, has no application. The language therein is "on account of any act done under color of his office." Certainly mere repose or quiescence are not *acts done* under color of office. The "color of office" has nothing to do with it, and it seems to us that "color of office" is quite beside the mark. We think it was not the purpose of the statute (and much less the language of it) for the Federal Court to assume jurisdiction of a non-federal question when the defendant asserting the right of removal *has done no act.* And, be it remembered, that if the trustees are not entitled to removal under Sec. 76 they are not entitled to removal at all.

They are not seeking the right of removal on account of the existence of any Federal question involved on the face of plaintiff's petition.

It is submitted that the decisions of this Court have already settled the question at issue against petitioners' contention.

In the case of *Maryland v. Soper,* 270 U. S. 9, 36, 44, opinion by Mr. Chief Justice Taft, it is said:

> "In respect of the removal of state prosecutions, there should be a more liberal use of mandamus than in removal of civil cases."

This quotation is made because the cited case was a criminal prosecution originating in a State Court and sought to be removed by certiorari under Section 76, the procedure here followed by petitioners. In the Soper case, this Court said, further:

> "The prosecution to be removed under the section must have been instituted 'on account of' *acts done by the defendant* as a Federal officer under color of his office or of the revenue or prohibition law. There must be a causal connection between what the *officer has done* under asserted official authority and the State prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the *acts done by him* under color of Federal authority and in enforcement of Federal law, and he must by direct averment *exclude the possibility* that it was based on acts or conduct of his, not justified by Federal duty."

Further:

> "It is enough if the prosecution for murder is based or arises out of the *acts he did* under authority of Feleral law in the discharge of his duty and *only by reason thereof*."

And further:

> "In answer to the suggestion that our construction of Sec. 33 (Sec. 76 U. S. C.) and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operation of Sec. 33, we can only say that if prosecutions of this kind come to be used to obstruct seriously the enforcement of Federal laws, it will be for Congress in its discretion to amend Sec. 33, so that the words 'on account of' shall be enlarged to mean that any prosecution of a Federal

> officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of Federal law may be removed for trial to the proper Federal Court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of Sec. 33 cannot be broadened by fair construction to give it such a meaning. These were not prosecutions, therefore, commenced on account of *acts done by these defendants solely in pursuance of their Federal authority.*" (Our italics.)

It would seem to do violence to the language of the section to hold that the mere quiescence or repose of the petitioning trustees in the failure of the railroads to comply with their contract constituted acts done under color of their (the trustees') office. And, more especially so, since the breach of the contract, as alleged by plaintiff in the State Court, was complete and plaintiff's cause of action fully accrued against the railroads themselves before even the adjudication in bankruptcy was had or the petition therefor was filed. Certainly, it would seem clear that the case in the State Court was not, in the language quoted above, "commenced on account of acts done by these defendants (the bankrupts and their trustees) solely in pursuance of their Federal authority." The acts of the railroad companies themselves giving rise to plaintiff's cause of action were begun and the cause of action completed before the District Court of Missouri acquired jurisdiction.

POINT II

The Petition for Certiorari and Removal Presented by Petitioners to the United States District Court for the Southern District of Texas Was Wholly Insufficient in its Allegations of Fact to Have Justified That Court in Removing the Cause from the State Court to the District Court by Certiorari.

The petition to the United States District Court for removal by certiorari is found in the Record, pp. 16-25. The substance of it consists merely in alleging that plaintiff in the State Court had brought suit on October 2, 1933, against petitioners to cancel certain deeds covering an easement and right of way over certain lands, "due to the alleged *failure* of petitioners to observe and comply with certain alleged conditions in said deeds contained, with respect to the operation of their trains." This was not an accurate statement, in that plaintiff alleged in the State Court that the respective breaches of contract had been begun by the railroads in December, 1931, and February, 1933, long before the appointment of the trustees or the adjudication (R. 75-76).

The suit against the railroads was filed on August 7, 1933, and the trustees were brought in by amendment on October 2, 1933 (R. 16-17). Petitioners for certiorari further set up in the District Court the plaintiff's prayer in the State Court for injunction (on final judgment) from the use of the portion of the right of way involved in the suit and plaintiff's prayer for damages. Thereupon, petitioners set up the history of the proceedings in the District Court of the United States for the Eastern Division, Eastern District of Missouri, with copies of the proceedings in that court, and alleged that "as such trustees, and such officers of court, they were, prior

to the institution of the suit first described, in possession and entitled to the possession of the lands, premises and properties described in plaintiff's petition in said suit" (R. 22-23).

Petitioners further alleged that the suit in the State Court "is a civil suit commenced in a court of the State of Texas against your petitioners, and each of them, as officers of a court of the United States, to-wit: the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, and is a suit for and on account of acts done under color of the office of your petitioners, and each of them, and in the performance of the duties imposed upon your petitioners, and each of them, as such officers of court; and the necessary *effect of the institution and prosecution* of said suit in said State Court *is, and will be*, to materially interfere with and *obstruct the jurisdiction* and powers of said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri with respect to the properties and assets of debtors, the Beaumont, Sour Lake & Western Railway Company and the Houston North Shore Railway Company, and each of them." (R. 23.) (Italics ours.)*

Sec. 76, Title 28, U. S. C., does not, *in any respect*, provide for removal by certiorari to the District Court because the proceedings in one court *might tend to interfere with those in another*. And this aside from the fact that plaintiff in the State Court, prior to hearing in

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*This being an original proceeding in the Supreme Court, we are filing herewith certified copy of an order concerning filing claims of creditors filed in the District Court, Eastern Division, Eastern Judicial District of Missouri, on May 15, 1933. It provides, among other things, that claims, "except as otherwise provided herein, may be liquidated in the jurisdiction where pending, subject to right of removal or appeal and subject to any stay orders entered in this proceeding."

the District Court of the petition for certiorari, specifically dismissed in the State Court any prayer for injunction or injunctive relief against petitioners even on final judgment (R. 61-62). Not only so, but plaintiff prayed only that the judgment in the State Court be certified to the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, for such observance as the latter might give (R. 83).

The petition of plaintiff in the State Court was before and was considered by the Honorable District Court on the motion for certiorari, as shown by the Record, as well as by the return of Honorable Thomas M. Kennerly, United States District Judge, to the rule to show cause. Moreover, petitioners, by amendment to their petition for certiorari in the District Court, prayed that it be considered as an exhibit to their petition (R. 26).

Thus, plaintiff's petition in the State Court spoke for itself, and no nomenclature in the motion for certiorari on the part of petitioners could change its effect or substance. Their allegations were mere conclusions. No facts were alleged tending to show that the suit had been brought in the State Court "for or on account of any act done under color of office." The simple facts were that plaintiff had filed a suit against them in their official capacity for damages, and for adjudication of title to real estate on account of alleged non-feasance by the railroads before bankruptcy, and with respect to which non-feasance the trustees had been quiescent, the cause of action having been completed before adjudication and before the trustees were appointed.

That the petition for removal, when considered in connection with plaintiff's petition in the State Court, was insufficient in its allegations to justify the District Court in removing the cause by certiorari, see *Maryland*

v. Soper, 270 U. S. 9, 36, 44, very pertinent and implicit quotations from which have been made *supra*. See also *Colorado v. Sims*, 286 U. S. 510, opinion by Mr. Justice Butler. Both of these cases involved the very question of the issuance of mandamus by this Court to the District Court, and both arose under Sec. 76, which petitioners are now invoking. In the latter cited case it is said:

> "The burden is upon him who claims the removal plainly to set forth by petition made, signed and unequivocally verified by himself, *all the facts relating to the occurrence*, as he claims them to be, on which the accusation is based. Without such disclosure the court cannot determine *whether he* is *entitled* to immunity."

Further:

> "The statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of essential *details of the defense he claims*. They are not sufficient to enable the court to determine whether his claim of immunity rests on any *substantial basis* or is made in good faith." (Our italics.)

Mr. Justice Butler, in the same case, announced the following wholesome rule:

> "And it is axiomatic that the right of the States, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the Federal Government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers and employees are not, merely because

they are such, granted immunity from prosecution in State Courts for crimes against State law."

That the jurisdiction to remove under the invoked section rests and depends upon the statement of the facts as distinguished from the conclusions made in the petition for removal, see *Virginia v. Paul*, 148 U. S. 407.

It is nowhere alleged in the petition to the lower court for certiorari, nor is it shown in the exhibits thereto, that petitioners in their official capacity have done or suffered anything to be done, either of commission or omission, upon the authority, express or implied, of the Federal Court of Missouri. They do not allege that the Missouri Court has taken any cognizance of the controversy or has any notice of it. They do not allege any order of the Federal Court of Missouri or direction from it, general or special, remotely bearing upon the issue between them and the plaintiff. They do not allege that they have been confronted even with any choice of duty or action with respect to it.

The only permissible inference is that the allegations of fact upon which plaintiff brings the suit may or may not be true, and the petitioners do not at all commit themselves in the petition for certiorari to the lower court as to whether they are or are not.

We take it this does not meet the test laid down by this Court in the leading and controlling cases of *Maryland v. Soper* and *Colorado v. Sims*, *supra*. Such allegations do not exclude the possibility that the controversy arose outside of any connection with their duties as trustees in bankruptcy; they do not exclude the possibility that the controversy may have arisen because of a violation of the contract, *which even their Federal duty obligated them to perform*. They do not allege expressly or impliedly that any Federal law, rule or statute consti-

tutes any defense to the suit. They do not allege, by inference even, that any acts or any inactivity by them was *"solely in pursuance of their Federal authority,"* in the language of *Maryland v. Soper, supra.* They do not allege that the controversy arose or the suit was instituted by reason of their *discharge of their duty and only by reason thereof,* as laid down in the same case, or that their Federal duty has had anything to do with the controversy.

The language used by Mr. Justice Butler in *Colorado v. Sims, supra,* is directly applicable when it is said in the opinion that the "statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of *essential details of the defense he claims,* and that *"they are not sufficient to enable the court to determine whether his claim of immunity rests on any substantial basis."* The petition does not state *"all the facts relating to the occurrence,* as he (petitioner) claims them to be," *or any of the facts.* But solely because they are *trustees in bankruptcy* under the amendment to the Bankruptcy Act of 1933, they have chosen and rest upon their right of removal.

In Vol. XLVI, p. 91, *Harvard Law Review,* November, 1932, is an interesting treatise on "Mandamus in the Supreme Court Since the Judiciary Act of 1925." It is said that "Mandamus is an extraordinary remedy normally available only where other remedies are inadequate; it is equally true that today the Supreme Court can hardly be expected to assume voluntary jurisdiction in cases not involving issues of general or national importance;" that "a petition for mandamus (in the Supreme Court), like an application for certiorari, is addressed to the court's discretion."

Attention is therein directed to the fact that during

the seven terms intervening between the passage of the Judiciary Act of 1925 and June, 1932, seventy-two original motions were presented to the Supreme Court for leave to file such petitions, of which but five were granted, and of which latter number three involved the question of calling a three-judge court, and but two involved removal to Federal or remand to State Courts. Dealing with cases of mandamus before the Supreme Court to compel a lower court *to assume jurisdiction*, it is noted that during the seven terms then past, all the petitions of this type presented to the Supreme Court had been denied without opinion.

All of which seems to leave it apparent that one seeking mandamus in an original proceeding in this Court must show himself clearly and without doubt entitled to it; that he has no other remedy; that the lower court has abused its discretion in a clear case, and that the case as made in the lower court is so clear there is no room for exercise of discretion.

We submit, without further argument, that such is not the case made by petitioners in the District Court of the United States for the Southern District of Texas. They have shown no such clear right. Their petition to the court below is hardly more than an intimation of their conclusions, without a statement of any facts of alleged defense. If petitioners have a Federal defense to the suit in the State Court (for it is apparent no Federal question is shown on the face of plaintiff's petition in the State Court), they may set it up in the State Court and they have their remedy in the Supreme Court of the United States if the courts of the State of Texas deny them any justifiable Federal defense.

In the following Points III and IV we shall address ourselves to the propositions (1) that *trustees in bank-*

ruptcy as such do not have the right of removal under Sec. 76 by certiorari, *qua* their trusteeship; and (2) that the amendment of 1933 to the Bankruptcy Act has not changed the jurisdictional status of the petitioning trustees so as to accord them such right in this case.

POINT III

Should Point I and Point II above submitted and the arguments thereunder be ruled adversely to our contentions, then nevertheless the suit is clearly not removable into the District Court by certiorari, because:

Under the provisions of Title 11, Sec. 46(a), of the United States Code relating to bankruptcy, the United States District Courts have jurisdiction between trustees and adverse claimants concerning the property acquired or claimed by the trustee in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Title 11, Sec. 46(a) of the United States Code provides that:

> "The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants *concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.*"

This statute was enacted in 1898 and has been on the statute books for nearly forty years. It has uniformly been construed to mean what it says. But it is now contended, in effect, in the case at bar that it has been repealed by Sec. 76, and that a trustee in bankruptcy as an officer of the courts of the United States enjoys the privileges of Sec. 76.

The contention of petitioners must necessarily be, in effect, that Sec. 76 repeals this statute of nearly forty years standing, otherwise (as we conceive), their contention for the right to removal by certiorari immediately falls.

Although the words contained in Sec. 76, under which the right of removal by certiorari is now contended for by petitioners, were inserted as an amendment to said section in the year 1916, now nearly twenty years ago, this is the first time, to our knowledge, that a contention has been made that trustees in bankruptcy, by virtue of the amendment, are entitled to remove causes out of the State to the Federal Courts by writs of certiorari to State Courts directing them to send up the record.

The recent opinion of the Circuit Court of Appeals of the Fifth Circuit, in the case of *Ruff v. Gay*, 67 Fed. (2) 684 (Advance Reports, January 22, 1934), held that a *receiver* under appointment of a Federal Court was not entitled to removal under Sec. 76 merely because he was such receiver nor because he was claiming the right of removal "for or on account of any act done under color of his office." The opinion was written by Circuit Judge Hutcheson, one of the profoundest lawyers on the Circuits, in the course of whose opinion it was held that it was not intended by Congress, by amendment of Sec. 76 in 1916, "to make a secret breach in the removal laws," nor "to open the floodgates of jurisdiction to pour into the Federal Courts all suits against Federal receivers."

United States District Judge Kennerly, in the case at bar, followed the holding of *Ruff v. Gay*, as shown by his return to the rule; the petitioners here being *bankruptcy trustees*. If the Circuit Court of Appeals of the Fifth Circuit thought that the floodgates were about to be opened by the secret breach in the removal laws as

pertains to *Federal receivers*, it is quite interesting that now the attempt is being made to open up the jurisdiction, under the 1916 amendment to Sec. 76, to *trustees in bankruptcy*.

Yet, it would appear, that if the one contention for the enlarged jurisdiction is sound, the other, by parity of reasoning, may be likewise so, and we shall have the anomalous situation that three sections of the Code relating to jurisdiction of the Federal Courts have been repealed by Congress (as we shall later attempt to show must follow), without reference having been made to them by name or number and without the knowledge of the bar or judiciary that such purpose was contemplated; without the knowledge even of the Congress that such had been done.

The opinion of the court in *Ruff v. Gay* will be discussed subsequently herein, as well as the question of repeal by intendment of the three suggested jurisdictional statutes, but at the moment we shall be concerned with but one of them.

We turn, then, again to the above quoted Sec. 46(a), Title 11, U. S. C. A., inhibiting jurisdiction to Federal Courts in cases against bankruptcy trustees. Briefly, we point out the construction which this Court and other Federal Courts have placed upon it ever since its enactment in 1898.

Under this statute it has been held that (quotations from Anno. Code):

> "It was not intended by this section to increase the jurisdiction of the United States courts in bankruptcy matters, but rather to limit it to such suits and controversies as are within the jurisdiction given such courts by the acts creating them, that is, controversies in law and in equity with adverse

> claimants where the requisite jurisdictional amount is involved and diverse citizenship exists (the citizenship test being, because of the Bankruptcy Act, that of the bankrupt and not that of the trustee), or there is a cause of action arising under the Constitution or laws of the United States. *Lovell v. Newman* (La., 1913), 227 U.S. 412, 33 S. Ct. 375, 57 L. Ed. 577. See, also, *Bush v. Elliott* (Ala., 1906), 202 U. S. 477, 26 S. Ct. 668, 50 L. Ed. 1114, 15 Am. Bankr. Rep. 656."

It has also been held that:

> "The clause of this section restricting the conferred jurisdiction 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants,' indicates the intention of Congress that the ascertainment, as between the trustees in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustees does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because of the rights of the bankrupt and of his creditors having been transferred to the trustee in bankruptcy. *Lovell v. Newman* (La., 1913), 227 U. S. 412, 33 S. Ct. 375, 57 L. Ed. 577."

There is a very clear distinction with which, of course, this Court is familiar, between summary proceedings in bankruptcy to obtain possession of property colorably or fraudulently withheld from the possession of the trustee and plenary suits between the trustee and third persons where no act of bad faith or fraud is involved. In other words, *summary proceedings* in the bankruptcy court are authorized in some instances to regain and hold pos-

session of property claimed to belong to the trustee, and jurisdiction of the bankruptcy court as such attaches to a number of other cases upon their peculiar facts.

However, where there is merely a suit between the trustee and third parties as to the status of property and the respective interests of the trustee and third parties therein, it needs no citation of authorities for the proposition that such controversy must be determined by a plenary as distinguished from *summary proceedings* in the bankruptcy court.

Under the authority of Sec. 46, the United States District Courts have only jurisdiction "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants" in cases that are not justified by *summary proceedings*. And:

> "It is well settled that property or money held adversely to the bankrupt can only be recovered by a plenary suit and not by a summary proceeding in a bankruptcy court. *Louisville Trust Co. v. Comingor* (Ky., 1902), 22 S. Ct. 293, 184 U. S. 18, 46 L. Ed. 413; *First National Bank of Chicago v. Chicago Title & Trust Co.* (Ill., 1905), 25 S. Ct. 693, 198 U. S. 280, 49 L. Ed. 1051; *Galbraith v. Vallely* (N. D., 1921), 41 S. Ct. 415, 256 U. S. 46, 65 L. Ed. 823."

It has been held that:

> "The mere fact that a person has been adjudged a bankrupt does not deprive other persons, owning or claiming purely legal rights to property claimed by the trustee, of having such rights adjudicated in the courts and by the procedure guaranteed to them by the Constitution. *In re Peacock* (C. C. N. C., 1910), 178 F. 851."

And in this connection see *In re: Midtown Contracting Company*, 243 F. 56, 155 C. C. A. 586 (certiorari denied), where it is held that if a real adverse claim exists, as distinguished from one which is merely colorable, the claimant can not be compelled to try the issue in the bankruptcy court; that if there is a real question, either of law or of fact, the claimant need not submit it to the bankrupt court, unless he consents to do so; but the trustee must institute his independent action in a court having jurisdiction of the subject-matter and have his claim regularly adjudicated, as the bankrupt himself must have done had bankruptcy proceedings not been pending. See, in this connection, *Wilds v. Department of Education*, 245 U. S. 654, 62 L. Ed. 532. It is well settled that a suit to quiet title lies against a trustee in the State Court without reference to the bankrupt court. *Rice v. Kelly* (Ky.), 10 S. W. (2) 1112.

That the jurisdiction of a District Court of a suit by an adverse claimant of property against a trustee in bankruptcy is expressly excluded by this section where it would not have had jurisdiction if the suit had been against the bankrupt, see *Hatch v. Curtin* (C. C. Mass., 1906), 146 F. 200, 16 Am. Bankr. Rep. 629. See, also, *Goodier v. Barnes* (C. C. N. Y., 1899), 94 F. 798.

That in all controversies between the trustee of the bankrupt's estate and a stranger or third parties, as to the title and ownership of property alleged to belong to the estate of the bankrupt, the jurisdiction of the State Courts is expressly preserved; and the trustee is relegated to such courts for the determination of his rights when the bankrupt himself should or could have litigated them therein, excepting as to proceedings under Sections 96(b), 107(e) and 110(e), unless the consent of the defendant has been obtained as required by the

statute, see *Bardea v. Hawarden First National Bank* (Pa., 1900), 178 U. S. 524; *Heath v. Shafer* (D. C. Iowa, 1899), 93 Fed. 647, 3 Am. Bankr. Rep. 88; *Cox v. Wall* (D. C. N. C., 1900), 99 F. 546, affirmed Wall v. Cox (C. C. A., 1900), 101 F. 403, certified questions answered (1901), 21 S. Ct. 642; *In re Nixon* (D. C. Mont., 1901), 110 F. 633, 6 Am. Bankr. Rep. 693; *Lawrence v. Lowrie* (D. C. Pa., 1903), 133 F. 995, 81 Minn. 341, 82 N. W. 1058, 83 N. W. 694, 95 N. W. 1015, 11 Am. Bankr. Rep. 152; *Jones v. Schermerhorn* (1900), 53 App. Div. 494, 65 N. Y. S. 999; *Nye v. Hart* (1901), 12 Ohio Cir. Dec. 419; *Breckons v. Snyder* (1905), 211 Pa. 176, 60 A. 575, 15 Am. Bankr. Rep. 112.

POINT IV

The amendment (47 Statutes, Ch. 204, Sec. 1; Title 11, Ch. 8, Secs. 201-205, U. S. C. A.) of March 3, 1933, to the Bankruptcy Act, does not in any respect change or amend Title 11, Sec. 46(a), U. S. C. The amendment of 1933 nowise affects the definite limitation upon the jurisdiction of Federal Courts in actions against trustees in bankruptcy as governed by the terms of Title 11, Sec. 46(a), U. S. C., as enacted in 1898. The trustees in bankruptcy of railroad corporations appointed pursuant to the 1933 amendment are still only bankruptcy trustees for Federal jurisdictional purposes. Said trustees in bankruptcy of railroad companies under the 1933 amendment are not entitled to remove to the Federal Courts actions against them as such otherwise than in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and adverse claimants.

The amendment of 1933, we submit, will be examined in vain to find an intention to repeal or supersede the provisions of Title 11, Sec. 46(a), of the Bankruptcy Act, relating to jurisdiction of Federal Courts, in actions against the trustees of railroads in bankruptcy, which are provided for in the amendment. On the contrary, the amendment clearly evinces a purpose not to do so.

The amendment of 1933 provides, Title 11, Sec. 205, Par. C, that the trustee *"shall exercise all the powers of a trustee appointed pursuant to Sec. 72, or any other section of this Title."* Section 72, of Title 11, is that provision of the Bankruptcy Act which provides that the

creditors of a bankrupt estate shall appoint a trustee in bankruptcy, or, if the creditors do not appoint such trustee, the court shall do so. Therefore, the trustees in the case at bar are yet only trustees in bankruptcy, with the additional powers given to them under the 1933 amendment.

There is nothing in the amendment of 1933 to show that a trustee for a railroad company in bankruptcy has any other status, *with respect to jurisdictional purposes*, than a trustee appointed under the bankruptcy statutes. The trustees, under the amendment, are still trustees in bankruptcy, although, under authority of the court, they are given certain rights to operate the railroads. *Trustees in bankruptcy, before the amendment, could likewise operate property of bankrupt estates under order and permission of the court.*

So that the fact that the trustee (and in some instances the bankrupt railroads) are permitted under the amendment to continue to operate the railroads under the direction of the court, does not in fact change the character of the trustees from being nevertheless *trustees in bankruptcy.*

Provisions are made in the amendment for the "debtor (railroad) to present its plan of reorganization" before the Interstate Commerce Commission, and for the debtor to accept the plan of reorganization and under certain provisions to "have full power and authority to put into effect and carry out the plan." Moreover, in Sec. 205, Par. N of Title 11, of the amendment of 1933 pertaining to railroads, it is provided that "the *jurisdiction* and powers of the court, the duties of the debtor and the *rights* and liabilities of the *creditors, and of all persons with respect to the debtor and his property*, shall be *the same as if a voluntary petition for adjudication had*

been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

This provision has reference to the general provisions of the Bankruptcy Act, and in no sense enlarges the jurisdiction of the Federal Court over the trustees of the railroad *for Federal jurisdictional purposes.*

As showing that the distinction between an equity receiver of a railroad and a trustee in bankruptcy, under the amendment, undoubtedly exists, and that the trustees in bankruptcy under the amendment are not in any sense Federal receivers, Sec. 205, Par. k, of the amendment provides:

> "If a receiver of all or any part of the property of a corporation has been appointed by a Federal or State court, whether before or after this chapter takes effect, the railroad corporation may nevertheless file a petition or answer under this section at any time thereafter, but if it does so and the petition is approved the trustee or trustees appointed under the provisions of this section shall be entitled forthwith to possession of such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver with maximum limits approved by the commission. If a receiver has been appointed by a Federal or State court prior to the dismissal under subdivision (c), clause (7), of a proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver so appointed, upon such terms as the judge may deem equitable

for the protection of the obligations incurred by the trustee and for the payment of administrative expenses and allowances in the proceeding hereunder."

We conclude from the foregoing provision of the amendment that the same distinction still exists now as heretofore between a receiver in equity of a railroad and a trustee in bankruptcy of a railroad under the 1933 amendment, and this by virtue of the terms of the amendment itself.

Even if it were held that a Federal receiver in equity were entitled to removal by certiorari for or on account of any act done in the performance of his duty, *qua* his being such receiver, it does not follow that a bankruptcy trustee may do so.

If he may, then this Court must hold, it seems to us, that Title 11, Sec. 46(a) was repealed by the amendment in 1916 to Title 28, Sec. 76, relied on by petitioners. This Court, it seems necessarily to follow, must also hold that the Federal Employers Liability Acts, which also expressly forbid removal, have also, as pertains to removal, been repealed by Sec. 76. This Court must also hold that the amendment to Sec. 76 has likewise repealed Title 28, Sec. 125, U. S. C., which provides that every receiver of property appointed by any court of the United States may be sued in any other court without previous leave, and which has been construed, since its enactment in 1887, as permitting the plaintiff to bring his action in the local courts and to have the justice of his demand there tried.

But we leave such consideration for discussion under the next Point. Opposing counsel have not been able to point to a case where a trustee in bankruptcy, merely because he was such, has been permitted to remove a

cause under the procedure here chosen and under the amendment to the statute here relied upon. We have been unable to find one. But *Jergens v. Bonded Products Corp.*, 13 Fed. (2) 417 (E. D. New York), specifically held that a bankruptcy trustee was not entitled to remove under the invoked section.

The amendment of 1933 to the Bankruptcy Act, extending the privileges of the Act under certain conditions to railroad companies, gives no suggestion of a purpose to amend the statute respecting jurisdiction of State Courts in ordinary actions against such bankruptcy trustees, but to our mind clearly evinces, by its specific terms above quoted, a contrary purpose.

We think, without question, that if the trustees in bankruptcy here can remove the cause to the District Court of the United States, then every trustee in bankruptcy may, for the same reason and under the statute here relied upon, remove each controversy with adverse third parties into the District Court. If this is a removable case, all controversies between bankruptcy trustees and third parties respecting contracts made by bankrupts before adjudication in bankruptcy are also removable under the statute here invoked. The same reasoning that would permit the one would, it seems clear to us, necessarily permit the other.

The floodgates of jurisdiction would then be opened widely indeed. For, be it remembered, the profession has not placed the construction on the amendment to Sec. 76 contended for, in effect, by petitioners, viz., that bankruptcy trustees are within its terms, although the amendment thereto relied upon by petitioners was enacted in 1916.

The Supreme Court of the United States will not, of course, hesitate, on account of considerations of juris-

dictional policy, to apply the law as it is written. But we submit that a proper construction of the statutes in question does not lead to the conclusion of any implied repeal of the jurisdictional statutes. That question we shall now notice briefly.

POINT V

It is insupportable to conclude that the amendment to Sec. 76, Title 28, U. S. C. (providing for removal to the District Courts by certiorari of suits commenced in courts of the State against officers of the courts of the United States, for or on account of acts done under color of their office or in the performance of their duties) has resulted in the repeal of Title 11, Sec. 46(a), U. S. C. (limiting Federal jurisdiction in suits against bankruptcy trustees concerning property acquired or claimed by the trustees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants).

Repeals by implication, under a long line of decisions by the Supreme Court, are not favored. Moreover, Sec. 46(a) is a prior statute (1898) relating to the PARTICULAR case involving jurisdiction of the Federal Courts with respect to trustees in bankruptcy; while the amendment to Sec. 76 (1916) is a subsequent law most GENERAL in its operation. The fact that the latter is GENERAL and the former SPECIAL creates a presumption that the SPECIAL is to be considered as remaining an EXCEPTION to the GENERAL. A special statutory provision affording a remedy for SPECIFIC CASES is not repealed by a GENERAL LAW unless the repeal be in express words or the conclusion of a purpose to repeal be irresistible.

POINT VI

More especially is our proposition advanced in Point V unassailable, when it is considered that if the amendment to Sec. 76 should be held to repeal the special statute in Point V referred to, then it would have to follow, by parity of reasoning, that the amendment to Sec. 76 also repealed two other special and prior statutes in limitation of Federal jurisdiction, viz., (1) Title 28, Sec. 125, U. S. C. (1887), permitting every receiver appointed by a United States Court to be sued in the courts of the States without previous leave of the court in which such receiver is appointed; and (2) the prior (1908) Federal Employers Liability Acts, which by their terms forbid removals to the Federal Courts.

The Honorable United States District Court made return to the rule that in refusing petitioners' application for removal, it acted in deference to the decision of the Fifth Circuit Court of Appeals in the case of *Ruff v. Gay*. It may be said, as a matter of course, that in following the opinion in *Ruff v. Gay*, the denial of petitioners' motion necessarily resulted.

If a Federal *receiver* is not entitled to removal, obviously a *trustee in bankruptcy* is not. But it does not resultantly follow that if a Federal *receiver* may remove that a *bankruptcy trustee* may. The two lie pretty closely parallel, however, so that argument for or against the one is apropos of the other. And yet, by virtue of the inhibition of the statute relating to the Federal jurisdictional privileges of bankruptcy trustees, and the very fact that since 1916, when the invoked amendment was passed, this is probably the case of first impression rais-

ing the contention that such trustees may remove for or on account of acts done under color of their office, it seems that the contention is far-fetched. For, to sustain it, the bankruptcy statute referred to would have to be considered as repealed by implication, a *non-sequitur*, indeed, from the fact of the enactment of the amendment invoked.

In 1888 the Congress enacted the following statute, now carried as Sec. 125, Title 28, U. S. C. It provides that:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

From the outset, the lower Federal Courts gave it the construction which the Supreme Court later distinctly approved in the case of *Gableman v. Peoria D. & E. R. Co.*, 179 U. S. 335, opinion by Chief Justice Fuller, decided in 1901. In that opinion Chief Justice Fuller said:

> "This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition."

Further:

"The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appoined under the general equity powers of the courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of opinion that the question must be answered in the negative, and that this has been heretofore so determined as the Circuit Court of Appeals properly held in this case. Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 879; Pope v. Louisville, N. A. & C. R. Co., 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; McKenna v. Simpson, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104."

Trial by jury was one of the principal objects of the Act and it did away with the necessity of an equity intervention in the forum or jurisdiction of the receiver.

Although the amendment to Sec. 76 invoked by petitioners was passed in 1916, not until considerably after the decision in 1926 of *Barnette v. Wells Fargo Nevada National Bank*, 270 U. S. 438, opinion by Mr. Justice Stone, was it contended that the former statute had been superseded or repealed by the much invoked Sec. 76.

It is true that one of the District Courts, in *Matarazzo v. Hustis* (1919), 256 Fed. 882, had inferentially so held. That case, however, was a suit by an alien against a citizen. The Court held that the case was within the judicial power of the United States under the Constitution (Art. 3, Sec. 2), and was thus within the original jurisdiction of the District Court as defined by the Judicial Code and was thus a suit which might be removed. We regard it as weak, if any, authority for petitioners' contention in this case.

The case of *Newall v. Byram* (1928), 26 Fed. (2) 200, opinion by Circuit Judge Sanborn, while holding that a suit in the State Court against a Federal receiver was removable, *qua* his mere appointment under the equity powers of the District Court, discussed the question but very briefly. The statute above quoted, as well as the opinion by Mr. Chief Justice Fuller in *Gableman v. Peoria Ry., supra*, seem not to have been considered. We say so because the eminent judge does not discuss or advert to the statute of 1888 or to any assumed purpose of Congress to repeal it, and gives no consideration to any assumed purpose of Congress to change or amend the act.

The Circuit Court of Appeals of the Fifth Circuit, in a persuasive and convincing opinion by Circuit Judge Hutcheson, in *Ruff v. Gay*, held that the *Barnette* case, *supra*, did not support the contention that the former statute had been superseded. The Circuit Court of Appeals of the Eighth Circuit, in *Newall v. Byram*, 26 Fed. (2) 200, and some of the District Courts, have relied on the *Barnette* case as authority for removal of cases against Federal receivers merely because they are appointed under the general equity powers of Federal Courts. That, as a corollary therefrom, the Act of 1888

must be concluded to have been impliedly repealed by the amendment to Sec. 76, in 1916, goes without saying.

It was but natural and logical, and but another step in the same direction, for the contention to arise that the provisions of the Federal Employers Liability Acts (that, "no case arising under this Chapter and brought in any State Court of competent jurisdiction shall be removed to any court of the United States"), were also repealed by Sec. 76. Some of the Federal cases, *Behrens v. Byram*, 26 Fed. (2) 953; *Elliott v. Wheelock*, 34 Fed. (2) 213, have so held.

It was further quite to have been expected, and perhaps we shall have to concede, not quite illogical that the contention would sooner or later be made that the invoked amendment to Sec. 76 likewise repealed the provisions of the jurisdictional statute relating to suits against *trustees in bankruptcy*. And so the attempted encroachment grows.

The case of *Barnette v. Wells Fargo Nevada National Bank*, we submit, is not fairly susceptible to the construction thus placed upon it. In the first place, "The jurisdiction of the District Court was not challenged in the Circuit Court of Appeals," says Mr. Justice Stone in the opinion, "nor is it challenged here."

A petition for removal had been made and granted and a motion to remand had been denied by the District Court. The copies of the removal proceedings were omitted from the transcript on appeal under stipulation, to diminish the record. The Court continues: "It therefore does not affirmatively appear on what ground the removal to the District Court was sought, allowed and sustained." This Court held no more, on close analysis of the majority opinion, that that, "as the removal is not challenged here, we think the *presumption should be*

indulged that the removal was rightly taken, and that the District Court had jurisdiction."

Both the District Court and the Circuit Court of Appeals had assumed jurisdiction; the District Court having done so on mature consideration on motion to remand, a reviewable question on appeal, which plaintiff in the case had concededly passed as having been correctly decided by the District Court.

This Court could not well have deliberately concluded that the cause was removable on the ground that the defendant was a Federal receiver, and, likewise, at the same time, have reached the conclusion that "we think the *presumption should be indulged that the removal was rightly taken,* and that the District Court had jurisdiction." Moreover, said Mr. Justice Stone in the opinion, "But the record shows that shortly after the suit was begun, the Court of Alaska expressly authorized the receiver to appear in the suit and to make defense and present a counter-claim to it."

Mr. Justice Brandeis and Mr. Justice Sanford dissented and insisted that "this Court should, in its discretion, order that all papers in the D[illegible]ourt relating to the removal be filed here, so t[illegible]e may determine whether the lower courts have properly exercised jurisdiction." And, as further stated by Mr. Justice Brandeis in the dissenting opinion, it was not shown *"whether all the defendants joined in the petition for removal and, if not, by whom removal was sought; on what ground removal was sought, whether that ground was good in law and whether it was substantiated by the facts appearing of record; from what court the removal was sought; what action the court and the respective parties took; and whether, indeed, there was any proper petition for removal filed in time."*

Thus, it is apparent that the conclusion of the majority, viz., that, *"as the removal is not challenged here, we think the presumption should be indulged that the removal was rightly taken and that the District Court had jurisdiction,"* constitutes practically the whole force of the opinion as an authoritative expression. Obviously, this Court reached the conclusion that all the matters of question raised in the dissenting opinion by Mr. Justice Brandeis would be properly presumed for purposes of jurisdiction. *No one of them was less vital to jurisdiction than the other, and every one of them was inherently vital.*

The case, therefore, should not be regarded as further authority than the actual grounds on which it is essentially based. Having in deference to the District Court and the Circuit Court of Appeals indulged the presumption of jurisdiction in the courts below, the presumption was necessarily indulged *for all purposes and upon all grounds.* Thus, we think the case supports but slightly, if at all, petitioners' position.

We turn now to the question whether the enactment of the invoked amendment to Sec. 76 has resulted in the repeal of Sec. 46(a), U. S. C., relating to jurisdiction of trustees in bankruptcy and, concomitantly, in the repeal of Sec. 125, U. S. C., permitting Federal equity receivers to be sued in the courts of the States, and the repeal as well of the provision of the Federal Employers Liability Acts forbidding removals.

Repeals by implication are not favored. The invoked statute is a *general* law and each of the other acts operate upon *particular* cases. A special statutory provision affording a remedy for *specific* cases is not repealed by a *general* law unless the repeal is in express words or the conclusion of a *purpose* to repeal is irresistible.

If there is repeal of a statute by implication, it must be by judicial construction, and the *intent* to repeal must be clearly manifest. Therefore, the attempt is to discover and declare the legislative intent, for there is certainly no intent to repeal here expressed.

In the case of *Washington v. Miller*, 235 U. S. 422, this Court, speaking through Mr. Justice Van Devanter, said:

> "No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication? There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of the terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute, and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creek. On the other hand, Sec. 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healy, 160 U. S. 136, 146, 40 L. ed. 369, 373, 16 Sup. Ct. Rep. 247; United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701; second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an ex-

ception to the general. (Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex parte Crow Dog (Ex parte Kaug Gi-Shin-Ca), 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rodgers v. United States, 185 U. S. 83, 87-89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582)."

In *United States v. Greathouse*, 166 U. S. 601, this Court said:

"Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. Frost v. Wenie, 157 U. S. 46, 58 (39; 614; 619); United States v. Healy, 160 U. S. 136, 147 (40; 369; 373)."

And in *Red Rock v. Henry*, 106 U. S. 596, it is said:

"The result of the authorities cited is, that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two Acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

In the case of *Petri v. Creelman*, 199 U. S. 487, it is said:

"It is elementary that repeals by implication are not favored, and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to

a particular case or subject, and the subsequent law is general in its operation."

And in the leading case of *Rodgers v. United States*, 185 U. S. 83, this Court quoted with approval both *Sedgwick on the Construction of Constitutional and Statutory Law* and *Black on Interpretation of Laws*, Both laid down the same rule, remarkably similar in effect, and since they both have had the approval of this Court, we quote them:

SEDGWICK:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

BLACK:

"As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so as to construe it in order to give its words any meaning at all."

It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will not ordinarily affect the

special provisions of an earlier statute; that the terms of a general statute broad enough to include the subject-matter in the special will not be understood as repealing the special, unless a repeal is expressly named. *Rodgers v. United States, supra.*

Without quotation, we cite the following cases:

Ex parte United States, 226 U. S. 420;
United States v. Healy, 160 U. S. 136;
Townsend v. Little, 109 U. S. 504;
Ex parte Crow Dog, 109 U. S. 556;
Great Northern Ry. Co. v. United States (C. C. A.), 155 Fed. 945;
General Motors Acceptance Corp. v. United States, 286 U. S. 49;
United States v. Burroughs, 289 U. S. 49.

In the latter case, opinion by Mr. Justice Roberts, many of the above decisions are cited, and it is said:

> "Implied repeals are not favored, and if effect can reasonably be given both statutes the presumption is that the earlier is intended to remain in force."

We refer also to *Knapp v. Byram*, 21 Fed. (2) 217, where authorities on the subject are collated and admirably discussed.

The Circuit Court of Appeals of the Fifth Circuit has, in the opinion of *Ruff v. Gay*, given the legislative history of the invoked amendment to Sec. 76 in its passage through Congress. We shall not repeat that history, which is there better and more succinctly stated than we could state it. But, somewhat aside, it is but just to say that the court's brief opinion in *Ruff v. Gay* has added more of substance and more of compelling force to the solution of the question under review than we could have expected to accomplish.

Certain that this Court will necessarily read and consider it, we have not sought, by quoting from it, to detract from the finished result of its concise and persuasive reasoning when read as a whole. We believe this Court will regard it to be implicitly sound.

But petitioners have attacked it from pages 15 to 42 of their brief with the proposition that if the language of a statute is indubitably clear, the language is conclusive and there is no room for construction; that the legislative annals, then, cannot be referred to in order to create doubt as to construction when there is no room for construction. If the petitioners' hypothesis were sound, then their proposition would be applicable. We think the hypothesis wholly unsound in its implication.

We, too, believe there is little or no room for construction when all four statutes are considered as a whole, as must be done, for then it appears to us the whole adverse contention for removal becomes unsound.

But if there were doubt that, in accordance with settled rules of construction, there has been no implied repeal of these statutes or any of them by the language of the amendment to Sec. 76, then obviously, to clarify that doubt, this Court may have recourse to the reports of the committees of Congress. Circuit Judge Hutcheson's reference thereto in the opinion in *Ruff v. Gay* was entirely proper.

In *Binns v. United States,* 194 U. S. 486, this Court, speaking through Mr. Justice Brewer, said:

> "While it is generally true that *debates* in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body (United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540), yet it is

also true that we have examined the *reports of the committees* of either body with a view of determining the scope of statutes passed on the strength of such reports. Church of Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511. When Sections 461 and 462 were under consideration in the Senate, the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

'The Committee on Territories have thoroughly investigated the condition of affairs in Alaska, and have prepared certain licenses, which in their judgment, will create a revenue sufficient to defray all the expenses of the government of the territory of Alaska. . . . They are licenses peculiar to the condition of affairs in the territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions, and upon the information of the committee, derived from conversing with them.' Vol. 32, Congressional Record, Part III, page 2235."

This Court, opinion by Mr. Justice Pitney, in *United States v. St. Paul, etc., Ry. Co.*, 247 U. S. 310, also said:

"It is not our purpose to relax the rule that *debates* in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. United States v. Trans-Missouri Freight

Asso., 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540. But *the reports of a committee*, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and *statements made by the committee chairman in charge of it*, stand upon a different footing, and may be resorted to under proper qualifications. Blake v. National City Bank, 23 Wall. 307, 317, 23 L. ed. 119, 120; Church of the Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Dunlap v. United States, 173 U. S. 65, 75, 43 L. ed. 616, 619, 19 Sup. Ct. Rep. 319; Binns v. United States, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816; Johnson v. Southern P. Co., 196 U. S. 1, 20, 49 L. ed. 363, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, 198, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Five Per Cent Discount Cases (United States v. M. H. Pulaski Co.), 243 U. S. 97, 107, 61 L. ed. 617, 621, 37 Sup. Ct. Rep. 346. The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; and not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but *an application of the doctrine of the old law, the mischief, and the remedy.*"

The last italicized words in the foregoing statement constitute, in closely parallel language, the same reasons given by Judge Hutcheson in *Ruff v. Gay* for reference

to the committee reports of Congress in reaching a construction of the invoked amendment.

And in *Lapina v. Williams*, 232 U. S. 78:

> "The legislative history of the act of 1903 demonstrates that the elimination of the word 'immigrant' and other equivalent qualifying phrases was done deliberately. The bill originated in the House of Representatives, where the *committee report* declared that its general purpose was 'to bring together in one act scattered legislation heretofore enacted in regard to the immigration of aliens into the United States; . . . to amend such portions thereof as have been found, either as the result of experience in administering the law or of judicial decision, to be inadequate to accomplish the purpose plainly intended thereby; and to add thereto such further provisions as seemed to be demanded by the consensus of enlightened public opinion.' H. Rept. 982, 57th. Con. 1st Sess. The report of the Senate Committee likewise explained the bill as being in the main a re-enactment of existing laws on the subject of immigration stating: 'The necessity for such re-enactment is due in part to the fact that, as a result of judicial decisions, as well as of administrative experience, the efficiency of such laws to accomplish the evident purpose of their enactment has been shown to be materially less than appeared to be the case at the time of such enactment, and therefore a new expression of the legislative will upon the subject of immigration has become desirable.' The Senate inserted the word 'immigrant' in one place, but it was eliminated in conference. S. Rept. 2119, 57th Cong. 1st Sess; S. Doc. 62, 57th Cong. 2d Sess. Cong. Record, vol. 36, p. 2949, 57th Cong. 2d Sess." (All italics ours.)

Further quotations from the authorities to the same

effect would but enlarge the brief. We have made these quotations from the older cases to show that resort in case of doubt to the reports of congressional committees is no new thing with this Court. That the same rule continues to be followed, we need but to cite:

Graham v. Goodell, 282 U. S. 409, opinion by Mr. Chief Justice Hughes (statements in reports of legislative committees taken into account in construing the Revenue Act of 1928 relating to income taxes); *McLean v. United States*, 226 U. S. 374, opinion by Mr. Justice McKenna (the reports of committees in congress consulted as an aid to ascertain the motive of Congress in passing a statute); *Matson Nav. Co. v. United States*, 284 U. S. 352, opinion by Mr. Justice Stone (reports of committee on bill taken into consideration in construing statute); *United States v. Flores*, 289 U. S. 137, opinion by Mr. Justice Stone (doubt as to meaning of a statute is resolved by the report thereon of a legislative committee for revision of the laws).

If there is doubt as to whether all the four statutes should stand together, then, obviously, under the authorities above cited, this Court, as held in *Ruff v. Gay*, may seek the reports of the committees of Congress as aids in interpretation.

With no purpose expressed in the amendment of any intention to repeal any prior special jurisdictional statutes by the enactment of the invoked amendment of 1916, and with the beneficent rule of construction in mind that each statute "must be construed in connection with the whole, so as to make all parts harmonize, if possible, and give meaning to each," it seems clear that before this Court would hold that there was a repeal by implication *(usually if not always a question of grave doubt)*, it would consult the legislative history. Espe-

cially so, your Honors, when all of the four statutes may consistently stand as applicable to their respective spheres, the later one, Sec. 76, not repealing or affecting the particular ones parceling out the jurisdiction in *their special and particular cases.*

The amendment to Sec. 76 is, *after all, but an amendment to a statute*, and, it seems clear, that the intention of the Congress was to confine the operation of the amendment to the subject of the *particular statute which was amended.* When the contrary contention is asserted, doubt becomes at once powerfully implicit in the very nature of the assertion. The committee reports upon the amendment, as set forth in the opinion in *Ruf v. Gay*, then become highly pertinent.

Pages 42 to 60 of petitioners' brief constitute an argument against the proposition that the invoked Sec. 76 and amendment thereto apply only to actions brought *personally* against officers of the courts of the United States. One would gather from petitioners' discussion of the case that the Circuit Court of Appeals, in *Ruf v. Gay*, based its opinion *solely on such ground.* Such is a total misconception.

A careful reading of the opinion shows that the basis of the opinion was that the amendment was *not intended* to accomplish "the result that all suits against receivers are now removable," and that "the amendment was not intended by the Congress to so result." The real basis of the opinion is the conclusion of the court that it was not intended to make a secret breach in the removal laws "by an amendment of three lines, tucked away in a section of the code relating entirely to the removal of suits and prosecutions against revenue officers, and officers of the Congress, a section having no relation whatever to receivers nor even generally to removals."

And the opinion referred to the Act of 1887, providing that suits against Federal receivers may be brought in any State Court of competent jurisdiction without leave of the Federal Courts appointing them, and to the opinion of Mr. Chief Justice Fuller, in *Gableman v. Peoria Ry. Co.*, 179 U. S. 335, approving that construction of the act, which the lower Federal Courts had consistently put on it. The opinion further referred to the Federal Employers Liability Acts and to some decisions of lower Federal Courts that the invoked amendment of 1916 had been held to repeal the provisions of said Acts forbidding their removal.

Thereupon, the opinion continued with an argument and a citation of authorities to the end that "significance and effect" should be accorded to all the statutes so as to harmonize them and "give meaning to each."

Finally, the opinion referred to and quoted the reports of the congressional committee that the *object and purpose* of the amendment was not to accomplish the result contended for by the cited decisions with which the court disagreed. So that the reasoning and foundation of the opinion was, in substance, that the statutes should be construed together as a whole, each retaining its effectiveness in its sphere, and that the invoked amendment should not be held to repeal by implication the others.

The opinion does certainly convey the thought that it was the impression of the court that the intention of Congress was that the invoked statute was meant for the protection of the officer "in his own person or property," and not in his "representative capacity," but the opinion as a whole is of vaster signification than this. We do not regard the expressions in that respect as at all necessary to the result reached by the court.

Yet we believe them to be inherently sound and that

the purpose of the Act was to give Federal officers a trial in the Federal Courts in cases where it was contended by them that in acting in the performance of their duties they had incurred suits or actions against them in their personal capacity.

The length the brief has already attained forbids an argument of the propositions, even if we could be of assistance to the Court. The recent leading cases of *Maryland v. Soper*, 270 U. S. 9, 36, 44, and *Colorado v. Sims*, 278 U. S. 510, as well as the pertinent observations of United States District Judge Reeves in *Slover v. Chicago Ry.*, 16 Fed. (2) 609, would seem to lead to the view expressed in *Ruff v. Gay*.

But we submit that whatever should be the conclusion of this Court on this proposition, the mandamus applied for should be refused on the other grounds.

Neither shall we care to take issue at length with the opposing contention over the proposition that it has long been the purpose of the Congress to restrict within bounds the jurisdiction of the Federal Courts. We may say that if Federal receivers and bankruptcy trustees, appointed under the equity power of the Federal District Courts, may now and hereafter remove all controversies, Federal and non-Federal questions, into the District Courts for trial merely because of their appointment under the equity powers, then the floodgates of jurisdiction will be wide indeed. The Federal Courts will have an additional enormous part of the litigation of the country.

Notwithstanding what is opposingly said to the contrary, it has, indeed, been the policy of Congress since 1887 to contract the jurisdiction of the Federal Courts. *Gableman v. Peoria Ry.*, 179 U. S. 335; *Tennessee v. Union Planters Bank*, 152 U. S. 454. The changes of

apparent necessity brought about in that respect, as referred to by counsel, by the former national prohibition amendment are hardly apropos.

We respectfully pray that the rule to show cause may be discharged and the writ of mandamus denied.

Respectfully submitted,

LON E. BLANKENBECKER,

Attorney for
Tyrrell & Garth Investment Company,
Plaintiff in the State Court.

RICHARD W. FRANKLIN,

Of Counsel.

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CHARLES ELMORE
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE:

L. W. BALDWIN AND GUY A. THOMPSON,

TRUSTEES, ET AL., *Petitioners*

PETITIONERS' REPLY BRIEF

EDWARD J. WHITE,
FRANK ANDREWS,
HARRY R. JONES,
ROBERT H. KELLEY,
Attorneys for Petitioners.

Houston, Texas,
February 8, 1934.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 13, ORIGINAL

EX PARTE:

L. W. BALDWIN AND GUY A. THOMPSON,

TRUSTEES, ET AL., *Petitioners*

PETITIONERS' REPLY BRIEF

Since Petitioners' main brief was filed a return has been made to the rule to show cause. The return—

(a) Admits the facts alleged in the Petition for Mandamus;

(b) States that the decision by which the District Court refused to enter an order of removal "was made in deference to the decision, on November 15, 1933, of the United States Circuit Court of Appeals for the Fifth Circuit in *Ruff v. Gay*," which has since been reported in 67 Fed. (2d) 684, Adv. Ops. of January 22, 1934.

The situation, therefore, seems to be the same as though the Petitioners had been met by a general demurrer.

The following reply is submitted to the brief filed herein by Tyrrell & Garth Investment Company, which, for convenience, will be referred to as "Intervenor:"

Intervenor's Point I:

As we understand it, the first point made is that under Section 76, Title 28, U. S. C., only those suits may be removed which are brought against a Federal court officer "for or on account of any *act done* under color of his office or in the performance of his duties as such officer," the attempt being to distinguish an *act done* from a mere *omission to act*. The contention is then advanced that, as against the Trustees, the suit in the State court is not based on any positive or affirmative *act* on their part, but, at most, on "mere quiescence or repose" (p. 12).

It will be noted at the outset that Intervenor neither had nor claimed to have any leave from the bankruptcy court to sue its Trustees in the State court (Petn. for Mand., 63). Therefore, aside from Section 46, Title 11, U. S. C., which will be later discussed, it must have claimed the right to sue without such leave by virtue of Section 125, Title 28, U. S. C. But under Section 125 it has the right to sue a trustee without leave of the court which appointed him only "in respect of any act or transaction of his in carrying on the business." By suing the Trustees in the State court without the consent of the St. Louis Federal court, the Intervenor impliedly, but necessarily, claimed that the suit was "in respect of an *act or transaction* of the Trustees in carrying on the

business." In the present attempt, however, to defeat the right of removal under Section 76, Title 28, Intervenor now asserts that the suit is *not* one "for or on account of any *act done*" under color of the Trustees' office or in the performance of their official duties.

Sections 76 and 125 are *in pari materia*. The word "act" is used in each. The word "transaction" (in Section 125) connotes more action and less passivity than the word "act." We often speak of an "act of omission," but we never speak of a "transaction" by one who has been completely passive. Having invoked the jurisdiction of the State court on the ground that the complaint against the Trustees grew out of their *acts*, it does not now lie in the mouth of the Intervenor to claim that its cause of action rests on passivity and inaction rather than on action.

Seeking evidently to bring itself within the terms of Section 46, Title 11, U. S. C., Intervenor, in its brief (pp. 7-12), proceeds upon the theory that the suit in the State court involves *only* the title to certain real property, which, according to Intervenor's contention, was forfeited by inaction, through breach of a condition subsequent occurring prior to the appointment of the Trustees, and indeed prior to the institution of the reorganization proceeding. Such is not the case.

The petition in the State court (Petn. for Mand., 63-83) involves much more. It alleges "that defendant railway companies *and said defendant Trustees*, their agents and servants are * * * trespassers upon said property" (p. 77). It does not allege that there was a *complete* cessation of service for the requisite period prior to the bankruptcy. The gist of the allegations, on the forfeiture branch of the case, is that *the service which was given* (in the affirmative operation of the property under

the orders of the court) was not sufficiently extensive, as to the length of the runs, and not sufficiently intensive, as to the frequency of the runs, to satisfy the alleged condition.

It is also alleged that "the failure to maintain said passenger service and the *curtailment and limitation of the same*, which plaintiff alleges to be *permanent*" (that is, will be affected by the future operations of the Trustees) "has resulted in great depreciation of the market value of its properties * * * $150,000, in which amount it has been damaged" (p. 79).

Further allegations are to the effect that Intervenor's predecessor conveyed to one Johnson, as a bonus, 1,000 acres of land; that the consideration therefor was the passenger schedule "and since the same is not being carried out and *the defendants*" (all of them) "announce their unwillingness to carry the same out further than is being done * * * Johnson ought in equity * * * be required to make good such failure of consideration * * * and since it is impossible to carry out said schedule, the said defendant railroads and their said Trustees are likewise legally liable * * * on account of the said schedule being wholly within their control. Plaintiff says said railway defendants and their said Trustees have thus made the performance of said schedule by said Johnson wholly impossible * * * and that plaintiff is entitled to recover from defendants" (including the Trustees) "the further sum of $10,000" (pp. 81-82).

In spite of the dismissal by Intervenor of its prayer for injunction, it still prays, in effect, for an adjudication of the title to the property and asks that the deeds under which the Petitioners hold the property be cancelled and rescinded and that the clouds thus cast upon its title to the property be removed by the Court's decree.

It is obvious that the real complaint in this respect goes beyond the mere alleged failure to render a certain *quantum* and extent of passenger service, and involves the *continued and active possession* of the property by the Trustees and their *active assertion of title* thereto.

Therefore, the case in the State court is more than a simple suit for judicial ascertainment of a forfeiture which became complete before the jurisdiction of the bankruptcy court attached. It is a case in which the Trustees, as such, are charged with active trespass; in which property held by the Trustees is claimed to have been lost by them and great damages are claimed to have been sustained by Intervenor by reason of the *manner of operating the property*, not only by the Trustees, but also by the companies while they, under the supervision and orders of the court, were in charge of the operation of the property. It is a case in which damages are claimed by virtue of an alleged announcement made by the companies and the Trustees, and by virtue of their arrangement of schedules to produce an economical operation. The damages sought are claimed to arise, in part from the manner in which the Trustees intend to operate the property in the future, and in part from the depreciation in the market value of Intervenor's lands said to result from the Trustees' public announcement that they would not intensify the passenger service to and through those lands.

"Curtailment or limitation" of service, as alleged in the petition, can only result from *action*. Unless the companies or the Trustees should give affirmative orders to reduce the service, and should promulgate a new schedule, the old schedule would necessarily continue in force and be observed by their employees.

The case is not predicated solely on, and the plaintiff is not limited under its allegations to proof of, facts which occurred before the institution of the bankruptcy proceedings. If it were, there would be no basis for a claim of damages against the Trustees. In that event, the only damages suffered would be payable out of the bankrupt estate without preference, and under the same classification as other damages incurred by the companies prior to the bankruptcy. It is *not* claimed merely that the Petitioners *did nothing*. The claim set up in the State court is that *what was done* (including occurrences subsequent to the beginning of the bankruptcy) was insufficient to avoid a breach of the alleged condition and gave rise to the alleged claim for damages. The case, therefore, was clearly one "for or on account of *acts done*."

It is also clear from this statement of the nature of the case made by the petition in the State court that Intervenor cannot bring itself within the provisions of Section 46, Title 11, quoted in its brief (p. 21). From the statement just given, it is plain that the case described in the petition in the State court is not merely a controversy "concerning the property acquired or claimed by the Trustees." It contains other elements, including the element of damages. Consequently, Intervenor cannot assert successfully both that it had a right, without leave from the bankruptcy court, to institute the suit against the Trustees in the State court and that no jurisdiction exists, on removal, in the Federal court to which removal is sought. The first point made by Intervenor, therefore, puts it in a position of attempting to defeat the removal which is here involved on the ground that it had no right, either under Section 125, Title 28, or under Section 46 of Title 11, to invoke the jurisdiction

of the State court which it did invoke by the filing of its petition.

From what has been said above it appears that the facts, including the nature of the case made by Intervenor's pleading in the State court, destroy the contention made under Point I, even if we concede the correctness of the strict and narrow construction which Intervenor would have the Court place on the words "act done." But that construction, we submit, is incorrect, for the following reasons:

(a) Section 76, Title 28, under which the right of removal is claimed, should be liberally, and not narrowly, construed. See the quotation, on page 42 of our main brief from *Colorado v. Symes*, 286 U. S. 510. See also *Venable v. Richards*, 105 U. S. 636.

In addition to other matters mentioned in our main brief (pp. 33-42) special attention is directed to the Act of March 3, 1875 (18 Stat. 401), by which the right of removal under the special procedure, now provided in Section 76, Title 28, U. S. C., was extended to officers of either House of Congress. This extension was accomplished by attaching to a Sundry Civil Appropriation Bill, as Section 8, an amendment offered, on March 1, 1875, by James G. Blaine, then Speaker of the House (Cong. Rec., Vol. 3, pt. 3, pp. 2016-7).

The section so added not only provides for removal, but also for representation of the official defendant by the United States attorney for the district within which the action is brought; for the supervision and direction of the defense of such action by the Attorney General of the United States, and for the application to such action of certain laws relating to "the paying of judgments against revenue or other officers of the United States."

This amendment was the direct result of an action

for damages which had been instituted against Blaine on account of the fact that, as Speaker, he had signed a warrant, pursuant to a resolution of the House, for the arrest and detention of a contumacious witness before a committee of the House. *Stewart v. Blaine*, 1 McArthur (D. C.) 453.

(b) The construction contended for by Intervenor would lead to absurd results. If a United States marshal is sued for damages in a State court, for the wrongful levy of an execution on exempt property, Intervenor would concede his right of removal because the suit would be one "on account of an *act done*." But if the marshal is sued for *failing* to make a levy, because he thought the property exempt, Intervenor would say that case is *not* removable, because based, not on an act *done* but on an act *omitted*. Intervenor would also concede the right of the marshal to remove a criminal prosecution against him for negligent homicide growing out of the death of a pedestrian by collision with the marshal's automobile while the marshal was in hot pursuit of a fugitive for whose arrest he held a warrant. This offense, if the marshal is not otherwise violating the penal laws, is a mere misdemeanor under Article 1243 of the Texas Penal Code of 1925. But Intervenor would contest the marshal's right of removal if he was indicted, in connection with the same transaction, for failing to stop and render assistance to the person struck as required by Article 1150 of said Code. Under Article 1150, the so-called hit-and-run driver is guilty of a felony. Intervenor's contention would also permit the removal of a suit against a railroad receiver based on excessive speed and resulting personal injuries, but would deny removal in a case of failure to stop a train after discovery of the plaintiff's peril.

Manifestly, Congress never intended that such absurdities and incongruities should arise in the practical application of the removal provisions of Section 76.

(c) To construe the words "act done" so as to include failure or forbearance to act would do no violence to the natural and accepted meaning of the words. Under the primary definition of "act" in Webster's New International Dictionary we find the following:

> "Jurisprudence is concerned only with outward *acts*. An '*act*' may, therefore, be defined, for the purposes of the science, as 'a determination of will, producing an effect in the sensible world.' The effect may be negative, in which case the *act* is properly described as a 'forbearance.' The essential elements of such an *act* are three, viz., the exertion of the will, an accompanying state of consciousness, a manifestation of the will."

Looked at in this light a deliberate forbearance by a trustee, marshal, or other officer of court is an "act done," representing a conscious exertion and manifestation of the will.

(d) A liberal interpretation of the words "act done" is supported by judicial decision. As has been explained, the rule of liberal interpretation is affirmed in *Colorado v. Symes, supra*, and it has been given a practical application in the decisions of this Court. Attention in this connection is directed to the cases cited on pages 42, *et seq.*, of our main brief.

As more immediately in point, on the present question, we cite:

(1) *Cleveland, etc., R. R. Co., v. McClung*, 119 U. S. 454. In this case, the carrier transported certain dutiable goods to the port of Cincinnati and there delivered them to the collector of customs, giving him notice in writing

of the carrier's lien for freight charges. The collector delivered the goods to the consignee, collecting from him the duties and freight charges due thereon. He *failed* to account to the railway company for the freight charges and it sued him to collect the same. The court held that the action was one for the recovery of money that had been collected by the customs collector or his deputy and for which he had failed to account. Despite this fact, it concluded that the case was plainly removable under the involved section of the code.

(2) *Warner v. Fowler*, 29 Federal Cases 255, 4 Blatchf. 311, was an action against a postmaster, instituted in a court of a State. Damages were sought for the alleged failure of the postmaster to deliver a letter. The case was removed to the Federal court. On motion to remand, District Judge Ingersoll held that the case was removable.

(3) *Fischer v. Daudistal*, 9 Fed. 145, was a suit of foreign attachment in a State court of Pennsylvania. The sheriff was directed to attach certain goods in the possession of a collector of customs. He tendered the duties on the goods and the collector refused to release them. A rule was then issued in the State court, directed to the collector, to show cause why he should not accept the duties and release the goods. He removed the case by certiorari into the Federal court and a motion to remand was filed. It will be observed that the whole basis of the suit was the *failure* of the collector of customs to accept the duties and release the goods. Without opinion, Circuit Judge McKinnon and District Judge Butler overruled the motion to remand.

(4) *American Locomotive Company v. Histed*, 18 Fed. (2d) 656. The opinion of the court does not state the facts involved. A receiver, under appointment of a

Federal court, was sued along with certain other defendants. The opinion states that "the whole action is based upon alleged delinquencies on his (the receiver's) part." A motion to remand was filed. The court held that the cause was removable under Section 33 of the Judicial Code (Section 76, Title 28, U. S. C.).

The above list is not intended as a complete citation of authorities. These cases are simply illustrative of the common trend of the decisions in which the statute has been interpreted and applied. They indicate quite clearly that the statute reaches and embraces all acts done by Federal court officers, whether of omission or commission.

We have previously alluded to Section 125, Title 28, U. S. C. This section permits suits against a trustee without previous leave of the court which appointed him only "in respect of any act or transaction of his in carrying on the business." The similarity, between "act or transaction" as used in this section and "acts done" as used in Section 76, has been noted. It is interesting to observe that Section 125 has been given a very broad interpretation.

In *McNulta v. Lochridge*, 141 U. S. 327, this Court held that this statute with respect to the question of liability, placed the receiver in the position of the corporation; that the receivership was continuous; and that one receiver could be sued under this Section for a cause of action arising from acts of his predecessor in office.

In *Erb v. Morasch*, 177 U. S. 584, opinion by Mr. Justice Brewer, it was stated that the receiver under this Section, "is liable to suit in a court other than that by which he was appointed, even in a State court, for *disregard of official duty* which causes injury to the party sued" (Italics ours).

In *Nashville Railway and Light Company v. Bunn*, 168 Fed. 862, opinion by Judge Lurton, it was stated that the statute reached and embraced "suits growing out of the operation by the receiver of the property in his possession."

This we believe to be the proper interpretation, not only of Section 125 but of Section 76 as well. Certainly, the decisions support this view. This Court well knows that Section 125 has been interpreted both by State and Federal courts as permitting suits against receivers, without previous leave of the appointing court, on any and all causes of action arising out of their operation and management of the property, except in those cases where it is sought to take from the receiver the title to or possession of property held by him.

No distinction has ever been drawn between affirmative action and failure to act or "quiescence." As an illustration, in *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593, the whole basis of the suit, which was for personal injuries, was defective condition of the roadbed of the railroad. The right to sue the receiver without leave was sustained, and the alleged distinction between acts and failure to act was not even raised. State court decisions on the point have been to the same general effect. As illustrative of these, we cite *Robinson v. Mills*, 65 Pac. (Mont.) 114, in which a receiver was sued for failure to repair streets; and *Fullerton v. Fordyce*, 25 S. W. (Mo. Sup.) 587, which was a suit for damages for failure to repair a station platform.

Section 125 has thus been construed and interpreted as embracing suits arising out of forbearance, inaction, failure to act and "quiescence" of receivers. The same interpretation should be placed upon Section 76.

Intervenor's Point II:

Intervenor here asserts that the petition for removal fails to allege sufficient facts to justify removal under the statute; in other words that it is subject to a general demurrer.

It is first claimed (pp. 15-17) that the petition for removal was bad because it alleged no *facts* disclosing that the suit had been brought for or on account of *acts done* under color of Petitioners' office. The amended and supplemental petition, as admitted by Intervenor on page 15, referred to a complete copy of the petition on file in the State court (Petn. for Mand., 26). In our reply to Point I we have already shown that the suit in the State court was one "on account of an act done," within the true meaning of Section 76. The *facts*, respecting the true nature of the asserted cause of action, could not be more fully alleged than by tender of a copy of plaintiff's petition. In that petition the Trustees are sued solely as Trustees. Their only connection with the suit is therein shown to be official and not at all personal.

It is then said (p. 17) that—

> "It is nowhere alleged in the petition to the lower court for certiorari, nor is it shown in the exhibits thereto, that petitioners in their official capacity have done or suffered anything to be done, either of commission or omission, upon the authority, express or implied, of the Federal Court of Missouri."

In the original petition for removal (Petn. for Mand., 16-25) it was alleged that Missouri Pacific Railroad Company had filed a re-organization petition in the proper court; that the corporate Petitioners, as its subsidiaries, had filed similar petitions in the same proceed-

ing; that the filing of such petitions had been duly approved (p. 18). Copies of these petitions were attached to the supplemental petition for removal as Exhibits "A" and "C" (pp. 28, 37). It was also alleged that orders had been entered (Exhibits "B" and "D," attached to the supplemental petition, pp. 32, 42) directing the debtors, until otherwise ordered, to manage and operate their properties and to conduct their business as railroad companies subject to the control of the court (pp. 18-20); that later the Trustee Petitioners were appointed and qualified as such and were directed to operate the properties with the powers previously vested in the debtors, and some further powers (pp. 20-21). Copies of the orders appointing the Trustees were attached to the supplemental petition (pp. 46, 50) as Exhibits "E" and "F." It was alleged (pp. 16-18) that the suit had been filed against the Petitioners in their official capacity; that all of them were officers of the Federal court at St. Louis (p. 22); and the plaintiff's petition was referred to (p. 18) "for a further statement of the allegations and prayers thereof and of the nature and objects of said suit." Finally, it was averred that the case in the State court was "a suit for and on account of acts done under color of the office of your Petitioners, and each of them, and in the performance of the duties imposed upon your Petitioners, and each of them, as such officers of court" (p. 23).

The orders of the St. Louis court, directing the operation of the property, manifestly required an economical operation, in the interest of the creditors, rather than a wasteful one. Had the debtors or the Trustees given, on any line, more service than the traffic reasonably required they would have been guilty of a breach of duty under their several appointments. Act of June 16, 1933, Public No. 68, 73 Cong., Sec. 4.

To remove a case under Section 76, Title 28, a Federal officer is manifestly not required to admit that the acts charged against him were, in fact, committed. Plainly, he is only required to show that, if committed, they occurred in line of duty or were done under color of his office. If such were not the case, a petition for a removal, in many instances, would be tantamount to a confession of guilt or liability. In a murder case, the real defense may be that some person other than the defendant killed the deceased. In a negligence case against a Federal receiver the real defense may be that the acts of negligence charged in the complaint were not committed. The statute is to have a liberal construction, as this Court declared in *Colorado v. Symes, supra*. The courts, therefore, will not attach to the privilege of removal any such penalty or condition. As was said in *Cleveland, etc., Rd. Co. v. McClung*, 119 U. S. 454:

> "But the petition alleges an act done by the collector under color of his office, and seeks a recovery on that account. Such a suit is removable; and certainly the right to a removal is not taken away because the collector says in his defense that the act charged was not in fact done. If done by him, it was done under color of his office. The thing to be tried is whether it was done."

In the section of Intervenor's brief beginning near the bottom of page 17, reference is made to *Colorado v. Symes, supra*, and to *Maryland v. Soper*, 270 U. S. 9. The State court cases involved in those decisions were criminal prosecutions. A Federal officer, seeking to remove a prosecution in which he is indicted, say, for assaulting or killing a named individual on a certain date, must evidently disclose in his petition for removal something of the facts relied upon to show that his part

in the transaction was official rather than personal. But where the effort is to remove a civil case, the petition or complaint in the State court will usually disclose the character of the officer and the official nature of the acts charged against him. If it does, a copy of the complaint makes the best possible showing with respect to the nature of the suit, the petitioner's office, and the connection between them.

Intervenor's Point III:

If we correctly analyze this point, it may be restated as follows:

The District Court, under Section 46, Title 11, U. S. C., has no jurisdiction (except in cases such as diversity of citizenship or of Federal questions, which are not here present) of a controversy between a trustee in bankruptcy and an adverse claimant concerning property acquired or claimed by the trustee; this is such a controversy; there can be no removal to a court which is without jurisdiction; the court to which removal is sought can be held to have jurisdiction only by deciding that the Act of 1916 (Section 76, Title 28) impliedly repealed the limitation thus placed by Section 46, Title 11, on the jurisdiction of the District court; and that there was no such repeal.

This argument falls completely because of two considerations:

(a) The suit in the State court is not a mere "controversy * * * concerning the property acquired or claimed by the Trustees." It is also a suit in which Intervenor seeks a recovery of damages against the Trustees. These damages, so sought, are not merely representative of the rental or other value of the property alleged to have been

withheld from the Intervenor by the Trustees, and thus merely incidental to the question of title, but are based upon other and different considerations. In part, at least, the damages sought represent an alleged depreciation in the market value of other property neither held nor claimed by the Trustees, claimed to have been caused by the operation by the Trustees of the property committed to them, and by the manner in which they propose to operate it in the future.

(b) Intervenor with respect to the damages which it seeks to recover in the State court is not an "adverse claimant" of property and to that extent the controversy in the State court is not one "between Trustees, as such, and adverse claimants."

In our main brief (pp. 7, 51-54) we showed that the right of removal under Section 76, Title 28, U. S. C., could not be defeated by the joinder, as co-defendant, of another party who is not a Federal officer. It seems plain that the right of removal under that section cannot be defeated by joining with a removable controversy another controversy or cause of action which otherwise would not be removable. In fact the joinder, as co-defendants, of persons not entitled to remove under Section 76 (because they are not Federal officers) necessarily implies that the complaint in the State court involves controversies (with the non-officers) which would not be removable except for the fact that they are coupled with a controversy which is removable under the terms of that section.

Therefore, inasmuch as the quoted section of the Bankruptcy Act does not touch the case, and cannot, in this controversy at least, conflict with Section 76, Title 28, U. S. C., it is useless to consider the question of implied repeal.

Intervenor's Point IV:

While we entertain grave doubts whether a trustee appointed under Section 77 of the Banruptcy Act (Act of March 3, 1933) is subject to all of the limitations imposed by law upon ordinary trustees in bankruptcy, it seems unnecessary, in the present case, to argue that question. An ordinary trustee would have the right to remove the case with which we are concerned. Section 46, Title 11, U. S. C., as we have shown, does not stand in the way. If an ordinary bankruptcy trustee may remove, cetainly these may, for Section 77 (c) of the Bankruptcy Act provides that they "shall exercise all the powers of a trustee appointed under Section 44 or any other section of this Act."

Intervenor's Point V:

It is likewise unnecessary in the present case to reach the conclusion from which Intervenor (p. 34) shrinks; namely, that Section 76, Title 28, U. S. C., as amended in 1916, repealed Section 46, Title 11, U. S. C. As we have shown, Section 46, Title 11, has no application to the present case because the suit in the State court is not solely a controversy "concerning the property acquired or claimed by the Trustees." It will be time enough to consider the question of repeal by implication when the Court has for decision a case to which Section 46, Title 11, is applicable.

It may be observed, however, that in our view counsel for Intervenor is mistaken as to which of these sections is a general and which a special act. The general grant of jurisdiction to the District courts in bankruptcy matters is contained in Title 28, Section 41 (19). Section 46 (a) of Title 11 is another general grant of jurisdiction,

with a limitation, over controversies, legal and equitable, between trustees in bankruptcy and adverse claimants of the property acquired or claimed by the trustees. On the other hand, Section 76 of Title 28, is not a general grant of jurisdiction. It is not even a general removal statute. It is a section which deals with the acquisition of jurisdiction, in certain special cases, by means of a special procedure for removal. To us, therefore, it appears that the special or particular act is contained in Section 76; and that by comparison Section 46, Title 11, is exceedingly general.

Intervenor's Point VI:

Intervenor has apparently overlooked a fact pointed out in our main brief (p. 73). Section 125, Title 28, U. S. C., was originally passed as Section 3 of the Act of March 3, 1887. It was one of three sections which were added to a House measure in the Senate. The other added provisions included the portion of Section 71, Title 28, concerning the finality of orders remanding suits to State courts and a declaration that nothing in the act should be deemed to repeal or affect any jurisdiction or right mentioned in certain sections of the Revised Statutes, including Section 643, which now appears as Section 76, Title 28, of the Code. In other words, the same act under which Section 125 came into existence distinctly preserved the rights guaranteed by the removal statute (Section 76), which is substantially the same in the present Code as it was in Section 643 of the Revised Statutes with the exception of the additions made by the Acts of 1875 and 1916, by which its benefits were extended to officers of Congress and of Federal courts. Under these circumstances, it is difficult to conceive of any question of repeal by implication as between

Sections 76 and 125 of Title 28, U. S. C. There may be a call for construction and interpretation, but hardly for any serious consideration of a repeal by implication. However, if the question of repeal by implication should arise—and to us it seems quite plain that it does not arise in this case—the express preservation of the rights guaranteed by Section 643 of the Revised Statutes, in the very Act which gave birth to what is now Section 125 of Title 28, would make a cogent argument that if either must repeal the other the actor must be the section which was so solicitously and expressly preserved in its full vigor by Section 5 of the Act of March 3, 1887.

It would profit nothing to argue the academic question of the effect of the removal provisions of Section 76, Title 28, on the anti-removal provisions of the Federal Employers' Liability Acts (Section 56, Title 45). The Employers' Liability Acts are in no way involved in the present case. If it should be true that a suit brought in a State court under the Employers' Liability Acts may not be removed to a Federal court under Section 76 of Title 28, it by no means follows that the suit brought by the Intervenor, which has nothing to do with those Acts, cannot be removed.

Conclusion

The ground upon which the question of removability was decided by the Circuit Court of Appeals in *Ruff v. Gay*, 67 Fed. (2d) 684, adversely to the contention of Petitioners, seems to have been abandoned by the Intervenor. The Intervenor has submitted its own independent contentions against the right of removal. We believe those contentions have been shown to be unsound. We recognize that the writ applied for is not a

matter of right, and that its issuance lies within the sound discretion of this Court. However, we believe that a clear case has been made for the exercise of that discretion.

The simple words of the statute are adequate to authorize the removal sought. The history of the statute and the decisions of this Court show clearly that the purposes of the statute were such as to require a liberal, rather than a strict or narrow, construction. The case sought to be removed lies within the very terms of the statute. There is no other Federal statute which precludes removal. In its return to the rule to show cause the District Court declared that the reason for its refusal to consider the case upon removal was not predicated upon any assumed deficiency in the application to remove, but rested solely on the then very recent decision of the Circuit Court of Appeals in *Ruff v. Gay, supra.* Under the statute, the Petitioners clearly had a right to remove the case from the State to the Federal court. Their right of removal was defeated, for the time being, by what appears to us to have been an erroneous construction of the statute by the Circuit Court of Appeals. Their right to remove, which is a right jealously guarded by Congress (Section 5 of the Act of March 3, 1887, 24 Stat. 553), can be preserved only by the issuance of the writ applied for. We respectfully pray that the Court exercise its discretion and direct the issuance of the writ.

Respectfully submitted,

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Attorneys for Petitioners.

Houston, Texas,
February 8, 1934.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 19, Original.—October Term, 1933.

Ex parte: In the Matter of L. W. Baldwin and Guy A. Thompson, Trustees, et al., Petitioners.

[March 19, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

This petition for a writ of mandamus, filed in this Court by leave, prays that the federal court for southern Texas and Thomas M. Kennerly, judge thereof, be commanded to take jurisdiction, on a petition for removal, of a suit instituted in a state court of Texas by Tyrrell-Garth Investment Company. The petitioners are the defendants in that suit.[1] Two of them, Baldwin and Thompson, are the trustees in bankruptcy of the Missouri Pacific Railroad system and are operating it. They were appointed by orders of the federal court for eastern Missouri entered in proceedings for reorganization under § 77 of the Bankruptcy Act as amended March 3, 1933, c. 204, § 1, 47 Stat. 1474. The other two petitioners are Texas corporations—Houston North Shore Railway Company and Beaumont, Sour Lake & Western Railway Company—and are parts of the Missouri Pacific system.[2]

The federal court entered an order denying the petition for removal and returned the papers to the petitioners, on the ground that it appears from the petition for removal that the suit is not one in which it is sought to hold the trustees "responsible in their own person and/or property but only in their representative capacity. See *Ruff* v. *Gay*, 3 Fed. Supp. 264; 67 F. (2d) 684." The Trustees claim that they are entitled to a writ of mandamus, because the suit in the state court is removable under § 33 of the Judicial Code as amended by Act of August 23, 1916, c. 399, 39 Stat. 532, being an action against officers of a court "of the United

[1] There is another defendant in the state court suit (Johnson) who did not join in the petition for removal. The allegations concerning him are not here material.

[2] All the stock of these corporations is owned by New Orleans, Texas & Mexico Railway Company; and nearly all of the latter's voting stock is owned by the Missouri Pacific.

States on account of acts done under color of their office and in performance of their duties as such officers.'"[3]

The petition for mandamus alleges that among the properties of which the Trustees took possession is an interurban railway in Texas, owned by the Houston North Shore Railway and leased to the Beaumont, Sour Lake & Western Railway; that they had taken possession of this property prior to the institution of the suit in the state court; and that the necessary effect of the institution and prosecution of the suit in the state court "is and will be to materially interfere with and obstruct the jurisdiction and powers of the federal court for eastern Missouri, with respect to the properties and assets of said debtors, the Beaumont, Sour Lake & Western Railway Company and Houston North Shore Railway Company, and each of them."

The petition for mandamus shows further, by reference to the complaint of the Investment Company, that a part of the interurban railway's right of way had been acquired by mesne conveyance from the predecessor in title of the Investment Company; that, after the Trustees took possession of this interurban railway, the Investment Company brought the suit in the state court in which it claims that it is the owner of the fee of a part of the land over which the railway extends and that the easement of right of way has been forfeited by failure of the Texas corporations and the Trustees to operate trains thereon in accordance with the conditions contained in a contract which accompanied the grant of the right of way,[4] and prayed as follows: That the deeds conveying the right of way be cancelled; that they be "annulled and held for naught as an existing cloud upon plaintiff's title to the lands

[3] Judicial Code, § 33 as amended provides: "When any civil suit . . . is commenced in any court of a State . . . against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer . . . the said suit . . . may, at any time before the trial or final hearing thereof be removed for trial into the district court . . . in the district where the same is pending."

[4] The contract provided for an easement subject to forfeiture for non-user for the purpose of an interurban railroad. "Non-user" is defined as failure to operate the railroad for 30 successive days; and "operation" as involving a passenger schedule over which first-class coaches must run over the entire line by electric or gas engines on a regular schedule of at least one train not less than every two hours of each day from six o'clock a. m. until twelve o'clock midnight.

and properties therein conveyed"; that the two railways and the trustees be enjoined from making further use of the lands for the operation of the interurban railway or otherwise; and that the complainant recover from Houston North Shore Railway and the trustees "in their capacity as trustees" damages in the sum of $150,000.

We are of opinion that the Trustees may be entitled to have their controversy with the Investment Company adjudicated in the federal court, but are not entitled to the remedy of mandamus, because to secure adjudication in the federal court of their rights and duties, they could have applied, and still can apply so far as now appears, either in the original bankruptcy proceeding, or by an ancillary bill in Texas, for an injunction to restrain the Investment Company from prosecuting its suit in the state court.

First. All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers, taken property into its possession the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; compare *Riehle* v. *Margolies*, 279 U. S. 218, 223; *Straton* v. *New*, 283 U. S. 319. The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. *Murphy* v. *John Hoffman Co.*, 211 U. S. 562, 569. In bankruptcy, this rule applies regardless of whether the property is located in the district in which the bankruptcy proceeding originated. The injunction to protect its possession may issue either from the court of original jurisdiction, or from the federal court for the district in which the state court suit is brought or in which the plaintiff in that suit resides. *Isaacs* v. *Hobbs Tie and Timber Company*, 282 U. S. 734, 737-8.[3]

[3]See In re Patterson Lumber Co., 228 Fed. 916; 247 Fed. 578; In re Lookout Mountain Co., 50 F. (2d) 421. As to railroads, see § 77 added to the Bankruptcy Act by Act of March 3, 1933, c. 204, § 1, 47 Stat. 1467, 1474.

Second. It is immaterial that the Investment Company, after the petition for removal had been presented to the federal court, amended its complaint in the state court by striking therefrom so much of the prayer as sought to enjoin the two railways and the Trustees from making further use of the lands for operation of the interurban railway or otherwise.[6] The purpose of the amendment was evidently to confine the litigation in the state court to the issue of the right and title to the property, as distinguished from its use during the pendency of the bankruptcy proceedings, in the hope of thereby removing the obvious interference with the jurisdiction of the bankruptcy court. But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title, was not limited to the prevention of interference with the use of the land. Compare *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1, 11; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 433. The jurisdiction extends also to the adjudication of questions respecting the title. *White* v. *Schloerb*, 178 U. S. 542; *In re Eppstein*, 156 Fed. 42. Compare *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54; *Security Mortgage Co.* v. *Powers*, 278 U. S. 149, 153.[7]

Third. The inherent power of the bankruptcy court to protect its jurisdiction, over property of which it has taken possession, from interference by suit thereafter begun in a state court has not been abridged by any legislation of Congress. The power is expressly reserved to the bankruptcy court in Judicial Code § 265, which contains the general prohibition against staying proceedings in state courts. Nor is this power of the bankruptcy court af-

[6]From the answer to the petition for removal filed by the Investment Company in the federal court it appears that, after the filing of the petition for removal, and before action thereon by the federal court, the Investment Company had moved in the state court to dismiss so much of the prayer in its suit as seeks an injunction against the Trustees in their official capacity and the two railway companies; and that the state court granted the motion "without prejudice to the plaintiff hereafter to seek such injunction against said defendant railway companies when and if they shall be discharged from jurisdiction and control of" the federal court for eastern Missouri. We have no occasion to consider the effect of the amendment so far as concerns the right of removal.

[7]Whitney *v.* Wenman, 198 U. S. 539. In re Rochford, 124 Fed. 182, 186; In re Moody, 131 Fed. 525; Fidelity Trust v. Gaskell, 195 Fed. 865; In re Dialogue, 241 Fed. 290; cases in Note 8, *infra*.

fected by § 23 (a) of the Bankruptcy Act of 1898, c. 541, 30 Stat. 552, which declares: .

"The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

That section relates only to suits in which the Trustees are plaintiffs. It has no restrictive effect on the right of trustees or receivers to protect their possession or title through proceedings in the bankruptcy court.[8]

Nor is the inherent power of the bankruptcy court to protect its jurisdiction in respect to property of which it has taken possession abridged by Judicial Code § 66, which declares:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

That section does not abridge the exclusive jurisdiction of the court over property of which it has taken possession. *In re Tyler*, 149 U. S. 165, 182-4.[9]

Fourth. It is true that the Investment Company seeks, in addition to the adjudication of the forfeiture of the right of way, damages "in the sum of $150,000" from the two railways and "from the trustees in their said capacity as trustees" for failure to maintain the daily schedule of passenger trains set forth in the contract. This prayer of the complaint is no bar to staying the suit in the state court. The exclusive jurisdiction of the bankruptcy court is determined by the main purpose of the s[illegible], which is to have the forfeiture declared and the alleged cloud

[8] J. I. Case Plow Works v. Fiaks, 81 Fed. 529; In re McCallum, 113 Fed. 393; In re Lipman, 201 Fed. 169; In re Williams, 53 F. (2d) 486.

[9] See also New River Coal Co. v. Buffner Bros., 165 Fed. 881; Dickinson v. Willis, 239 Fed. 171.

upon title removed. The claim for damages is merely an incident. Moreover, the breach of contract for which damages are claimed is not "an act or transaction of the 'trustees' in carrying on the business connected with such property". The breach alleged is that of "wholly" ceasing to maintain the passenger train schedule. It is alleged that this breach had occurred months before the commencement of the bankruptcy proceeding. The only wrong with which the Trustees are charged is in not "now maintaining" the service. Such non-feasance is not an "act or transaction" within the meaning of § 66.[10]

We have no occasion to determine otherwise the scope of Judicial Code § 33. Nor need we consider whether the federal court, if it had entertained the petition for removal, would have been obliged to dismiss the suit on the ground that the state court was without jurisdiction because the bankruptcy court had possession of the *res*. *Compare Isaacs* v. *Hobbs Timber & Tie Co.*, 282 U. S. 734, 738-9; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 382.[11] It is sufficient that the extraordinary remedy of mandamus should be denied, because the Trustees may by the common remedy of injunction prevent any interference with the jurisdiction of the bankruptcy court. Compare *Ex parte Park Square Automobile Station*, 244 U. S. 412, 414; *Ex parte Riddle*, 255 U. S. 450; *Ex parte Kreutler-Arnold Hinge Last Co.*, 286 U. S. 533. Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the state court.[12]

Rule discharged.

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[10]Compare Buckhannon & W. R. Co. *v.* Davis, 135 Fed. 707, 711; Love *v.* Louisville R. Co., 178 Fed. 507; Dickinson *v.* Willis, 239 Fed. 171; Field *v.* Kansas City Refining Co., 296 Fed. 800; 9 F. (2d) 213.

[11]Compare In re Zehner, 193 Fed. 787; First Trust Co. *v.* Baylor, 1 F. (2d) 24, 27. See note 12, *infra*.

[12]McHenry *v.* La Société Francaise, 95 U. S. 58; In re Johnson, 127 Fed. 618; In re Zehner, 193 Fed. 787; First Trust Co. *v.* Baylor, 1 F. (2d) 24, 27; In re Schulte-United, 50 F. (2d) 243; In re Gas Products Co., 57 F. (2d) 342; compare In re Schermerhorn, 145 Fed. 341; In re Locust Bldg., 272 Fed. 988; Field *v.* Kansas City Refining Co., 296 Fed. 800; 9 F. (2d) 213.